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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1223~~ 102

In the Matter of

RICHARD HOWARD JONES, *An Attorney,*
Respondent-Appellant,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1965

No.

In the Matter of

RICHARD HOWARD JONES, *An Attorney,*

Respondent-Appellant,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

JURISDICTIONAL STATEMENT

Respondent-Appellant (hereafter called "appellant") appeals from an Order of the Court of Appeals of the State of New York, dated July 9, 1965, granting the Petitioner-Appellee's (hereafter called "appellee") motion to dismiss appellant's appeal to that Court, as a matter of right, from an order and opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, filed the 4th day of March, 1965, disbarring the appellant from the practice of law in the State of New York, effective April 5, 1965. This statement is submitted by appellant to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented on the appeal.

Opinions Below

1. Opinion of the Court of Appeals of the State of New York:—The opinion of the Court of Appeals of the State of New York dismissing appellant's appeal as of right to that Court, is reported in 16 N. Y. 2d 829, 263 N. Y. S. 2d 172 (1965), and is printed in Appendix A, *infra*, at page 1a). The Order of the Court of Appeals dismissing the appellant's said appeal is attached to this statement as Appendix A, *infra*, at page 2a.

2. Opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:—The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, disbarring the appellant from the practice of law in this State is reported in 256 N. Y. S. 2d 972, 22 A. D. 2d 433 (1965), and is printed in Appendix B, *infra*, at pages 3a to 5a. The Order of the said Appellate Division disbarring the appellant is printed in Appendix B, *infra*, at pages 6a to 11a. The Orders of the said Appellate Division extending the effective date of disbarment are not reported, but are printed in Appendix B, *infra*, at pages 12a to 14a.

3. Opinion of the Court of Appeals of the State of New York:—The opinion of the Court of Appeals of the State of New York dismissing appellant's appeal to that Court, as a matter of right, from an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, denying appellant's motion to suppress certain evidence is reported in 230 N. Y. S. 2d 209, 11 N. Y. 2d 1054, 184 N. E. 2d 182 (1962), and is printed in Appendix C, *infra*, at page 15a, and the Court's Order is printed at page 16a.

4. OPINION OF THE APPELLATE DIVISION OF THE SUPREME URT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPART-NT:—There is no opinion of the Appellate Division of Supreme Court of the State of New York dismissing ellant's appeal to the Supreme Court of the United tes (1962) from the Order of the Court of Appeals, ve-mentioned. The Order of the said Appellate Divi- dismissing the appeal is reported in Appendix C, *infra*, ages 17a to 18a.

5. OPINION OF THE APPELLATE DIVISION OF THE SUPREME URT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPART-NT:—There is no opinion of the Appellate Division of Supreme Court of the State of New York, First Judi- Department denying appellant's motion to suppress tain evidence (1962), but the said Appellate Division's der denying the appellant's said motion to suppress is nted in Appendix C, *infra*, at pages 18a to 19a.

6. REFEREE'S ORDER:—The Referee's Order denying ellant's motion to suppress (1964), without opinion, is reported, but is printed at Appendix D, *infra*, at pages to 21a.

7. ORDERS OF THE APPELLATE DIVISION OF THE SUPREME URT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPART-NT EXTENDING APPELLANT'S TIME TO DOCKET APPEAL AND E JURISDICTIONAL STATEMENT:—The Orders of the Ap- late Division of the Supreme Court of the State of New rk, First Judicial Department, issued ex-parte, on notice he appellee, extending appellant's time to docket appeal file a jurisdictional statement are printed in Appendix *infra*, at pages 22a to 26a.

Jurisdiction

1. NATURE OF THE PROCEEDINGS:—The proceeding is one to discipline an attorney, and was instituted in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, against the appellant, an attorney, prsuant to Section 90(6) of the Judiciary Law of the State of New York, on three (3) separate petitions. Each petition is verified, and alleged, among other things, charges based upon bank accounts maintained by the appellant at various banking institutions within the City of New York. Each verified petition had annexed to it a schedule of checks, allegedly returned unpaid, which schedules were obtained through illegal use of the subpoenae power as prescribed in Article 33 of the Civil Practice Act (now Article 23 of the Civil Practice Law and Rules). The appellee seeks to justify the illegal and unconstitutional use of the subpoenae power solely on the ground that the appellant is an attorney-at-law, and cannot interpose constitutional objections to appellee's actions; further, appellee asserts that its actions are authorized by Rule 12 of the Special Rules of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Regulating the Conduct of Attorneys in the said department. Appellant rejected appellee's theories, and asserted that the actions of the appellee violated appellant's constitutional rights under the 4th, 5th and 14th amendments to the United States Constitution, and under Article 1, Section 12 of the New York State Constitution, and that Article 33 of the Civil Practice Act is unconstitutional, and in addition, appellant raised other constitutional questions, as hereafter set forth. The learned Appellate Division found for the Appellee, on each of two separate motions to suppress, and the appellant duly appealed to the Court of Appeals of the State of New York, pursuant to Sec. 90(8) of the Judciary Law of the State of New York, as a matter of right. The appellee moved in each instance, in the

Court of Appeals, to dismiss the appellant's appeal to that Court, and each such motion was granted. The first such motion was made in 1962, and appellant's appeal was dismissed on the ground that the order appealed from was interlocutory, and not final within the meaning of Article 6, Sec. 3 (formerly 7) of the New York State Constitution; the second such motion was granted and appellant's appeal was dismissed on the ground that no substantial constitutional question is raised on the appeal reviewable by the Court of Appeals under Section 90(8) of the Judiciary Law, Article 6, Sec. 3 (formerly 7) of the New York State Constitution, and Civil Practice Law and Rules (CPLR) Sections 5501(b), and 5601(a) and (b). In each instance, the appellant appealed to the Supreme Court of the United States, from the Court of Appeals' order dismissing appellant's said appeals. The first such appeal to this Court was dismissed by the Appellate Division, for the appellant's failure to prosecute the appeal, upon motion by the appellee. The order of dismissal is printed in Appendix C, *infra*, at pages 17a to 18a. The second appeal is the one currently before this Court.

2. Date of Order and Appeal:—The order of the Court of Appeals of the State of New York is dated July 9, 1965, and was filed on July 12, 1965. Notice of Appeal to this Court was duly served by appellant on October 9, 1965, upon the Appellee, and upon the Clerk of the Appellate Division, and was filed on October 13, 1965, by the said Clerk in the offices of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

3. Statutes Conferring Jurisdiction:—The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2), 69 Stat. 929 (See Appendix F, p. 27a).

4. CASES SUSTAINING JURISDICTION:—The following decisions sustain the jurisdiction of the Supreme Court to hear this appeal: *Willner* v. *Committee on Character and Fitness, etc.*, (N. Y. 1963) 83 S. Ct. 1175, 373 U. S. 96; *Schware* v. *Board of Bar Examiners of the State of New Mexico* (1957), 77 S. Ct. 752, 353 U. S. 232; *Konigsburg* v. *State Bar of California* (1961), 81 S. Ct. 997, 366 U. S. 36, 6 L. Ed. 2d 105, rehearing denied 82 S. Ct. 21, 368 U. S. 869, 7 L. Ed. 2d 69; *Lathrop* v. *Donohue* (Wisc. 1961), 81 S. Ct. 1826, 367 U. S. 820, 6 L. Ed. 2d 1191; rehearing denied 82 S. Ct. 23, 368 U. S. 871, 7 L. Ed. 2d 72; *Niemotho* v. *State of Maryland* (1951), 71 S. Ct. 325, 340 U. S. 268, 95 L. Ed. 280; *Barr* v. *City of Columbia* (S. C. 1964), 84 S. Ct. 1734, 378 U. S. 146, 12 L. Ed. 2d 766; *National Association for the Advancement of Colored People, Inc.* v. *State of Alabama ex rel. Flowers* (1964), 84 S. Ct. 1302, 377 U. S. 288, 121 L. Ed. 2d 325; *National Association for the Advancement of Colored People, Inc.*, v. *State of Alabama ex rel. Patterson*, 78 S. Ct. 1163, 357 U. S. 449, 2 L. Ed. 2d 1488; *Cramp* v. *Board of Public Instruction of Orange County, Fla.* (1961), 82 S. Ct. 275, 368 U. S. 278, 7 L. Ed. 2d 285, on remand 137 So. 2d 828; *Carrington* v. *Rash* (1965), 85 S. Ct. 775; *Local 333B, United Marine Division of Intern. Longshoremen's Ass'n (A.F.L.)* v. *Battle* (1951), 101 F. Supp. 650, affirmed 72 S. Ct. 178, 342 U. S. 880, 96 L. Ed. 661; *Hoyt* v. *State of Florida* (1961), 82 S. Ct. 159, 368 U. S. 57, 6 L. Ed. 2d 110; *Haynes* v. *State of Washington* (1963), 83 S. Ct. 1336, 373 U. S. 503 10 L. Ed. 2d 1397; *Metlankatla Indian Community, Annette Island Reserve* v. *Eagan*, 80 S. Ct. 1321, 363 U. S. 555, 4 L. Ed. 2d 1397; *Metlankatla Indian Community, Annette Island Reserve* v. *Egan* (Alaska, 1962), 82 S. Ct. 552, 369 U. S. 45, 7 L. Ed. 2d 562; *Young* v. *Ragen* (Ill. 1949), 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333; *Howitt* v. *Howitt* (1950), 90 F Supp. 528; *Kern-Limerick* v. *Scurlock* (Ark. 1954), 74 S. Ct. 403, 437 U. S. 110, 98 L. Ed. 546; *Naupe* v. *People of the State of Illinois*, 79 S. Ct. 1173, 360 U. S. 264, 3 L Ed. 2d

1217; *Pope* v. *Atlantic Coastline R. Co.* (Ga. 1953), 73 S. Ct. 749, 345 U. S. 379, 97 L. Ed. 1094, opinion conformed to 76 S. E. 2d 399, 209 Ga. 824; *Clark* v. *Willard,* 292 U. S. 112, 117-119; *Hill* v. *Chicago & Eastern R. Co.,* 140 U. S. 52, 54.

5. States Statutes Challenged:—The validity of the following statutes of the State of New York is challenged on this appeal: (a) *Judiciary Law,* Sec. 90(2), (6), (7), (8), and (9), Vol. 29, McKinney's Laws, pp. 107-109; the sections are set forth verbatim in Appendix F hereto, *infra,* at pages 27a to 30a; (b) *Civil Practice Act,* Sec. 588(1) (now Civil Practice Law and Rules Sections 5501(b) and 5601 (a) and (b)), Vol. 4, Gilbert-Bliss, p. 249 (7B McKinney's Laws, pp. 228, 496), the full text of the sections is set forth in Appendix F, *infra,* at pp. 30a to 32a; (c) Rule 12 of the Special Rules Regulating the Conduct of Attorneys in the First Judicial Department, Vol. 12, Gilbert-Bliss, 1965 Supp.; the full text of the rule is set forth in Appendix F, *infra,* at page 32a; (d) *Civil Practice Act,* Sections 403, 404, 406, 411, and 413, Vol. 3B Gilbert-Bliss, pp. 238-239, 241-242, 249, and 251 (Now Article 23 of the CPLR); the full text of the sections is set forth in Appendix F, *infra,* at page 33a to 35a; (e) Chapt. 819, Sec. 1 Laws of 1871, as amended by Chapt. 134, Laws of 1924, *The Association of the Bar of the City of New York, Year Book, 1961,* p. 153; the applicable portions of the text of the statute are set forth in Appendix F, *infra,* at page 35a; (f) By-Laws XIII(16) and XVI(2)(h) and (3) of the Bylaws of the Association of the Bar of the City of New York, the full text of which are set forth in Appendix F, *infra,* at pages 35a to 36a. The statutes involved deal with the discipline and regulation of the conduct of attorneys (Judiciary Law), the right of appeal in a disciplinary proceeding, the subpoenae power, and the conduct of disciplinary proceedings. They have been construed so as to deny the appellant the right to appeal in the first instance

from an order determining a disciplinary proceeding, and from an order determining an intermediate issue bearing upon substantial questions of violations of constitutional rights and due process of law, and to allow discrimination against attorney-respondents in disciplinary proceedings in so far as enforcing statutory provisions and rules governing the subpoena process.

6. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED: —The following constitutional provisions are involved: (a) United States Constitution, Amendment IV, Vol. 2 (Part 2) McKinney's Laws, p. 545; Amendment XIV(1), *ibid.*, p. 548; the full text of the constitutional provisions is set forth in Appendix G, *infra,* at page 37a; (b) New York State Constitutional provisions involved are Article 1, Sec. 1 as amended, Vol. 2 (Part 1) McKinney's Laws, p. 55, Article 1, Sec. 6, *ibid.,* p. 57, Article 1, Sec. 12, *ibid.,* p. 59, Article 6, Sec. 3 (formerly Sec. 7), *ibid.,* 1965 Supp., pp. 48-49, Article 3, Sec. 15 (formerly Sec. 16), *ibid.,* p. 78, the text of the foregoing state constitutional provisions is set forth in Appendix G, *infra,* at pages 37a to 39a; (c) the following other statute is involved: Civil Right Law, Article 2, Sec. 8, Vol. 8 McKinney's Laws, pp. 22-23; the text of the section is set forth in Appendix G, *infra,* at page 39a.

Questions Presented

I. A. Does the disbarment of appellant on the ground that he is unfit to continue in the practice of law, based upon a disciplinary proceeding charging appellant with specific acts of professional misconduct, but not alleging unfitness to continue in the practice of law, and in which the appellant was afforded no plenary hearing on the issue of his fitness to continue in the practice of law, constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

B. If so, then are the statutes that authorize the proceeding, to wit: Judiciary Law, Sec. 90(2),(6), and (7), unconstitutional by reason of their conflict with the constitution?

II. A. Where the legislature confers upon the Supreme Court of the State of New York, jurisdiction over the legal profession, and that court delegates some of its powers with respect to disciplining attorneys to a private, non-integrated, incorporated bar association, and neither the court nor the said bar association has either promulgated or published any rules and regulations governing the procedure in disciplinary proceedings, though authorized to do so, and the bar association and the court conduct disciplinary proceedings which appellant is required to defend without having at his disposal any rules, regulations, or guidelines as to procedure, and the bar association conducts its proceedings according its private, unpublished, and for the most part unobtainable (except to its membership, which is kept exclusive by design), bylaws, constitution, and articles of incorporation, does disbarment of appellant after such hearings constitute a deprivation of property without due process of law? If so, are the statutes and rules and/or regulations delegating such power, and under which the preceding are conducted, unconstitutional?

B. Where the appellee, a private corporation, under the pretext of conducting a preliminary investigation of appellant, employs subpoenas duces tecum, indiscriminately, to obtain appellant's bank records, without any knowledge or consent on the part of appellant, and in a manner not in conformity with the case law and the statutory law of the State of New York, and uses the information for the purpose of formulating charges of alleged professional misconduct against appellant, does such action on the part of the appellee violate the search and seizure provisions of the New York State and Federal constitu-

tions (Fourth Amendment to U. S. Constitution, and Article 1, Sec. 12 of the New York State Constitution), the due process clause of the Fourteenth Amendment to the United States Constitution, and of Article 1, Section 6 of the New York State Constitution, and are the statutes and/or rules under which the action is taken repugnant to the constitution of the United States?

C. Where appellant's property, to wit: books and papers are seized, pursuant to an illegal use of the subpoena duces tecum, so as to constitute an unreasonable search and seizure, and the appellee contends that the action taken by it is not illegal for the reason that the appellant, as an attorney at law, cannot assert a constitutional objection to appellee's actions, and the court sustains appellee's position, does the discriminatory application of the law, relating to subpoenas duces tecum, to attorneys, as being separate and apart from other citizens of the state, constitute a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and the privileges and immunities clauses of the New York State, and of the U. S. Constitutions? If so, are the statutes under which the action purports to be taken *unconstitutional*?

III. Where all litigants in the state courts of record are granted an appeal, in the first instance, as a matter of right, to the next highest court, from a decision of the court of original jurisdiction, and the Appellate Division of the Supreme Court of the State of New York, First Department is a court of record, but also a court of appellate jurisdiction, except in certain disciplinary proceedings, and appellant's proceedings originated in that court by reason of its legislative grant of supervisory powers over the admission and disciplining of attorneys, and the appellate division, after referring the proceeding to a referee "to hear and report with his recommendations", and the referee takes testimony for almost four years, and files his

report, and the appellate division unanimously reverses the referee's findings in so far as they found certain charges either "not sustained", or "dismissed", and the appellant appeals the appellate division's decision to the Court of Appeals, as a matter of right, on constitutional grounds, and the appellee moves to dismiss the appeal on the ground that there are no issues raised that are reviewable by that court, as a matter of right, and the Court of Appeals dismisses the appeal on the ground that "the appeal presents no substantial constitutional question", thereby depriving appellant of an appeal, in the first instance, except by order of the court, which is seldom granted, does dismissal of appellant's appeal constitute a violation of the equal protection and privileges and immunities; and due process clauses of the New York State and Federal constitutions? If so, are the statutes and state constitutional provisions restricting appellant's right to appeal unconstitutional?

IV. Where a charge, such as "engaged in the practice of issuing worthless checks", is no where defined by statute, rule, regulation, bylaw, or other edict, and has been so narrowly construed by the Courts of the state as to defy preparation of a defense thereto, or knowledge as to what to defend against, and neither the party asserting the charge nor the referee hearing the evidence is able to define it and to advise as to its component parts and elements, does such charge violate the due process clause of the fourteenth amendment, by reason of its vagueness and indefiniteness, and its failure to provide a standard of behavior which is definite and ascertainable, and because the charge itself is impossible to satisfy?

V. A. May the Supreme Court take jurisdiction of this case for the sole purpose of passing on whether the Court of Appeals of the State of New York had before it a substantial federal question, where the Court of Appeals did not rule on the merits of the appeal?

Statement of the Case

1. Statement of Facts

The Appellee instituted the disciplinary proceeding herein, against the Appellant on June 1, 1960, by the service of a Notice, dated May 31, 1960, a petition, verified May 31, 1960, and an affidavit, sworn to by Eric Nightingale, Esquire, on the 27th of May, 1960, returnable June 7, 1960, at the Appellate Division, First Department Courthouse. Issue was joined by service of the Appellant's verified answer on June 7, 1960. By order of the said Appellate Division filed July 5, 1960, the Hon John A. Mullen, then an Official Referee, was appointed referee in the proceedings to take testimony in regard to the charges in the said petition and to report the same, with his opinion thereon, to the Court. Appellee took no steps to prosecute the proceeding for almost a year. But, on April 18, 1961, Appellee served the Appellant with a Notice, Supplemental Petition, and Affidavit, all bearing date of April 19, 1961, as to issuance, verification, and oath. The Supplemental Petition was returnable May 9, 1961, at the said Appellate Division Courthouse. Issue was joined thereon by service of Appellant's verified answer to the Supplemental Petition on May 5, 1961. On May 25, 1961, an order was entered referring the said Supplemental Petition to the Hon. John A. Mullen, still an Official Referee, with instructions identical to those above stated. No further action was taken on either the Petition or the Supplemental Petition, until about October 5, 1961, when Appellant was served with a Notice of Hearing for November 15, 1961, before the said Referee.

On November 15, 1961, a hearing was held, and at the hearing, Appellee served Appellant with a Notice, Second Supplemental Petition, and Affidavit, all dated November 14, 1961, and returnable November 21, 1961, at the Appellate Division, First Department. Issue was joined thereon by service of Appellant's verified answer and defenses on December 5, 1961. By an order of the said Appellate Di-

vision dated December 12, 1961, the said Second Supplemental Petition was referred to the Hon. John A. Mullen, still an Official Referee, with the same instructions as previously stated for the Petition, in the said order of July 5, 1960.

Hearings were held on the Petition and Supplemental Petition on November 21, and on December 7, 1961, and on all the petitions on January 16, 1962.

By Order to Show Cause dated January 17, 1962, and returnable January 23, 1962, at Appellate Division, First Department, Appellant moved for an order granting him leave to strike out the charges and allegations set forth in subdivisions 6, 7, and 8 of paragraph IV of the Petition dated May 31, 1960, and for leave to strike out charges No. 5, 6, and 7 of the Supplemental Petition dated April 19, 1961, and for leave to strike out paragraphs 8, and 9 of Charge No. 9 of the Second Supplemental Petition dated November 14, 1961, and for an order suppressing the evidence in the hands of the Appellee relating to the said charges, on the grounds that the evidence was illegally obtained in violation of the Appellant's constitutional rights, both state and federal, to due process of law, by the illegal, abusive, and arbitrary use of subpoenas duces tecum. The motion was duly submitted, and by an order dated March 20, 1962, the said motion was denied in all respects. (Appendix C, pp. 18a to 19a.) Appellant served and filed a timely Notice of Appeal as of right, to the New York State Court of Appeals from the denial of the said motion.

Appellee moved by a Notice of Motion dated April 27, 1962, and returnable May 7, 1962, at the Court of Appeals, to dismiss the Appellant's appeal as of right, on the ground that the Order appealed from did not finally determine the proceeding within the meaning of the Constitution. Appellant duly opposed the motion; but, by an order dated June 12, 1962, the Court of Appeals granted Appellee's motion on the grounds above-stated. (Appendix C, pp. 15a to 16a.) By a Notice of Appeal dated September

11, 1962, Appellant appealed the Order of the Court of Appeals, aforementioned, to the Supreme Court of the United States, pursuant to the provisions of Title 28 USC 1257(2), on the following questions: (1) Do the provisions of Section 90(8) of the Judiciary Law of the State of New York, and Section 588(1) of the Civil Practice Act of the State of New York, together with Article 6, Sec. 7, of the New York State Constitution, operate so as to deprive a litigant whose cause originates in the Appellate Division of the Supreme Court of the State of New York, First Department, of his right to appeal, as a matter of right, from an order of the said Appellate Division, and if so, are these statutes and constitutional provisions repugnant to the equal protection clause of the United States constitution; and (2) is an order denying a motion to suppress such a final order, within the meaning of the United States and New York State Constitutions, as to support an appeal as a matter of right from its effects immediately upon the pronouncement of the order. Unfortunately, due to a mixup in filing the Notice of Appeal, and unfamiliarity with Appellate procedure in the United States Supreme Court, the statutes of limitations ran against the Appellant's time in which to docket the appeal. A motion was brought on by the Appellee by an order to show cause dated November 30, 1962, and returnable December 4, 1962, at Appellate Division, First Department, which motion Appellant opposed, an order was granted on December 18, 1962, dismissing the Appellant's Appeal to the U. S. Supreme Court. (Appendix C, pp. 17a to 18a.) There was never any appellate determination and/or review of the Appellate Division's Order denying the Appellant's motion to strike and to suppress. The said Order, then, is an intermediate order within these proceedings, and is reviewable under the Order of Disbarment. It is noteworthy that the Appellee raised no issue of lack of grounds for an appeal as a matter of right in connection with that appeal. It moved only on the ground that the order appealed from was not a final order.

In the interim, a hearing was held before the Referee on May 1, 1962, after which date no hearings were scheduled until March 1, 1963. Meanwhile, on September 1, 1962, the Referee's status changed to that of a Justice of the Supreme Court of the State of New York. Orders were subsequently entered (January 9, 1963, and resettled January 21, 1963) reappointing the Hon. John A. Mullen, a Justice of the Supreme Court of the State of New York, to continue the proceedings, with the same instructions as were contained in the 1960 order, heretofore mentioned.

Thereafter, hearings were held on March 1, 8, 15, and 29, 1963, during which period Appellee completed its direct case. On March 29, and April 4, and 5, 1963, Appellant cross-examined witnesses. Appellant's direct case and cross-examination were conducted on May 1, 2, and 3, 1963, at which time the hearings were terminated with the understanding that the Appellant would move before the Referee to strike certain charges and to suppress the evidence relating to them, which motion was made on May 10, 1963, on substantially different grounds from those relied upon in the motion of January 17, 1962, before the Appellate Division. The understanding at the close of the hearings on May 3, 1963, was that if the Referee denied Appellant's motion, Appellant would be allowed to submit testimony with respect to the charges by affidavit. However, the Referee, on May 29, 1963, filed his report on the proceedings, without having ruled on the motion. Ultimately, the Appellant was compelled to move in the Appellate Division to vacate the Referee's Report of May 29, 1963, and permit the Appellant to submit testimony with respect to the charges attacked on the motion to suppress. An order was entered by the Appellate Division granting Appellant partial relief, to wit: vacating the portion of the referee's report relating to the check charges, and granting appellant permission to testify with respect to the charges, which testimony was submitted in the form of an affidavit, sworn to the 6th day of November, 1963; however, as the referee had indicated in negotiations, between the filing of his

report of May 29, 1963 and the bringing of Appellant's motion to vacate the report, dated September 10, 1963, the second report, filed by the Referee on December 9, 1963, found all of the bank charges, as amended, sustained.

The crux of the Appellant's complaint herein is the manner in which the Appellee used subpoenas duces tecum to obtain Appellant's bank records—not from Appellant, but from the banks themselves. No notice of the issuance of the subpoenaes was given to the Appellant; therefore, Appellant had no opportunity to attack the subpoenaes, or to otherwise move to protect his interests, or to contest the validity of the subpoenaes. In each instance in which there is a charge against the Appellant of "engaging in the practice of issuing worthless checks", the subpoenaes by which the bank records were obtained were addressed to the bank and not to the Appellant. Without any knowledge on the part of Appellant, the records were sent, by mail, to the Appellee for its scrutiny, without the guidance of any Court, and without any testimony or any one to explain the significance of any of the items sent. On the return dates on the subpoenaes, there were no scheduled hearings before any committee or subcommittee of the appellee at which appellant was to be present, but the records received by appellee were submitted to one of appellee's subcommittees for its use and interpretation. Ultimately, the Appellant was sent a letter of charges pertaining to each subpoenaed account, to which was attached a schedule of "returned items" prepared by Appellee from the subpoenaed accounts. These same schedules, the authenticity of all of which is still unsettled, were attached to the three petitions in these proceedings as schedules. This means they were before the Referee, for all purposes, long before any testimony was even attempted to be offered with respect to them, and long before any testimony was taken or evidence offered as to their authenticity, all to the prejudice of the Appellant.

In addition, although the Appellee has the authority to promulgate rules of procedure with respect to disciplinary proceedings, and the Appellate Division also has such powers, neither has made any such rules; consequently, an attorney defending such a proceeding is usually groping in the dark—in the vernacular, "playing it by ear"—from one move to the next. To seek the guidance of either the Referee or of the Appellee is of no value, as evidenced in the record of these proceedings, in which the Appellant sought guidance on several points—particularly with respect to the meaning of the charge of "issuing worthless checks" insofar as what constitutes a "practice" (R., pp. 1131-1135).

The Appellee produced nothing to show that it made application to the Clerk of the Appellate Division for issuance of the subpoenaes as required by Special Rule 12 of the Rules of the Appellate Division, First Department. It produced a witness who testified that he went through the appellee's file on the appellant and destroyed the originals of the subpoenaes that would have contained the signature of the Clerk of the Appellate Division, and the affidavit of service of the process server (R., pp. 852-875; and 890-893). The only subpoenaes produced at the proceedings that were in proper form were those issued after the commencement of the proceedings before the referee, Rule 12 of the Special Rules of the Appellate Divisions, First Department makes no requirement that the original subpoena with an affidavit of service be filed so as to put interested parties on notice of its issuance. (Appendix F, p. 32a.)

After the Referee filed his final report on December 6, 1963, appellee on May 7, 1964, moved to confirm in part and to disaffirm in part the Referee's Reports of May 29, 1963, and December 6, 1963; appellant cross-moved on May 21, 1964 for the reverse relief. Both the motion and the Cross-Motion were returnable May 26, 1964. By an order of the Appellate Division, First Department, dated

March 4, 1965 (Appendix B, *infra*, pp. 6a to 11a), the motion was decided in favor of the appellee, and the appellant was disbarred. On April 10, 1965, appellant served a Notice of Appeal to the Court of Appeals of the State of New York, from the order of disbarment; whereupon the appellee moved to dismiss appellant's appeal (which was taken as a matter of right on the ground that appellant's constitutional rights had been violated, and on the further ground that certain state statutes, as applied to appellant, were unconstitutional), on the ground that the Court of Appeals lacked jurisdiction to entertain the appeal as a matter of right. Appellant opposed the motion and cross-moved to dismiss appellee's motion. On July 9, 1966, the Court of Appeals granted an order dismissing appellant's appeal to that Court on the ground that no substantial constitutional question was directly involved on the appeal (Appendix A, pp. 1a to 2a). Whereupon, appellant appealed to this Court, from the Court of Appeal's order, as hereinabove set forth.

Another prominent violation of "due process" is the failure on the part of either the Appellant or the Referee to provide the Appellant with either notice or hearing with respect to the issue of fitness to continue in the practice of law.

2. Manner of Raising Federal Questions

A. The questions with respect to search and seizure, due process, the constitutionality of Judiciary Law, Sec. 90(2), and (6), and (7), CPA 588(1), and New York Constitution, Article 6, Sec. 7, Article 2, Sec. 8, CPA 403, 404, 406, 411, and 413, Rule 12 of the Special Rules of the Appellate Division, First Judicial Department Regulating the Conduct of Attorneys, Bylaws XIII(16) and XVI (2)(h), and (3) of the bylaws of the Association of the Bar of the City of New York, Chapter 819, Sec. 1, Laws of 1871, as amended by Chapter 134 Laws of 1924, CPLR 5501(a) and 5601(a) and (b), were raised in the two

motions stated in the preceding "Statement of Facts", at pages 13 and 14, *supra.*

B. The constitutionality of Section 90(8) of the Judiciary Law was raised on the motions to dismiss appellants appeal to the Court of Appeals (pp. 13 and 17, *supra*).

C. The issues raised on these motions also included the violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

D. The issue of the vagueness and indefiniteness of the charge relating to appellant's checking accounts was raised in the record, by way of an inquiry to the referee as to a definition of the charge, and what would constitute evidence (Steno. Rec., pp. 1131-1135), and in appellant's "Testimony by Affidavit", sworn to November 6, 1963, at pages 19-20 thereof, as follows:

> "(b) With respect to each of the charges, and each subdivision of the charges enumerated in subdivision '(a)' of 'I', above, respondent moves to dismiss on any one or all of the following grounds:
>
> • • •
>
> "2) That the charges are too indefinite, uncertain, nebulous and vague to be susceptible of proof, or to enable the Respondent to prepare a defense."
>
> "(c) Respondent revives, repeats and reiterates each and every objection and motion made by him or on his behalf at the hearings with respect to the charges considered in this affidavit, and in written motions submitted to the referee herein, with respect to the admission into evidence of exhibits and testimony on behalf of the petitioner with respect to respondent's bank accounts, and with respect to the competency of the evidence and of the witness through whom it was submitted," • • •

E. The issue of "fitness to continue in the practice of law" was raised in appellant's memorandum in support

of his motion to confirm in part and to disaffirm in part the reports of the Referee, at pages 123 to 128, and in appellant's memorandum in opposition to the appellee's motion to dismiss appellant's appeal to the Court of Appeals at page 9 thereof.

3. The Federal Questions are Substantial

The questions presented by appellant in opposing appellee's motion to dismiss appellant's appeal to the Court of Appeals of the State of New York, as a matter of right, were jurisdictional questions, and that Court was required to go into the merits of appellant's claim and determine whether or not the acts complained of constituted a breach of mandatory duty, or such denial of fundamental "due process" as to compel the Court of Appeals to review the Appellate Division's order (*Tileston* v. *Ullman* (1943), 318 U. S. 44; *Frothingham* v. *Mellon* (1923), 262 U. S. 447, cited with approval by the D. C. SDNY, in *Union-Bag Camp Paper Corp.* v. *FTC,* 64 Civ. 615, filed 9/2/64). This, the learned Court of Appeals did not do. Neither did it render any opinion as to why the constitutional questions raised were not substantial. A cursory glance at the various decisions and orders set forth in Appendices A to D, readily reveals that in the proceedings herein, it has been the rule, rather than the exception, not to give reasons for any of the action taken; even the Appellate Division's reversal of the referee was not explained.

One of the first violations of the "due process" clause is the fact that when the Appellate Division reversed the referee, it reinstated two charges that the referee had dismissed at the end of the appellee's case, and in which the appellant did not testify because of the referee's rulings. Although the Appellate Division reinstated the charges, it afforded the appellant no further opportunity to testify with respect to them. Yet, after reinstating the charges, to wit: Charge relating to William Newsome, and the charge relating to The Carry-On-Club, Inc., the Appellate Division found them fully sustained. It is aca-

demic in law, that in a reversal of a nonsuit, a new trial must be ordered. (*Willner* v. *Committee,* 83 S. Ct., 1175, 373 U. S. 96; *Schware* v. *Board of Bar Examiners,* 77 S. Ct. 752, 353 U. S. 232; *Konigsburg* v. *State Bar of Calif.,* 366 N. Y. 36, 81 S. Ct. 997, 6 L. E. 2d 105, rehearing denied 82 S. Ct. 21, 368 U. S. 869, 7 L. Ed. 2d 69; *Haynes* v. *State of Washington* (1963), 83 S. Ct. 1336, 373 U. S. 503, 10 L. Ed. 2d 513).

Whether or not the delegation by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, of some of its powers under Section 90(2), (6), and (7) to the appellee is unconstitutional, is also a substantial question. This is particularly so in view of the fact that the appellee is a private corporation, created by a special act of the legislature, and has no judicial powers or investigative powers except as conferred upon it by the said appellate division. In order for a person to be admitted to practice law in the state of New York, he must go before a Committee on Character and Fitness, an independent committee, and qualify. The qualification consists of a revelation of every phase of his activities since childhood. He must show good moral character. Yet, to remove an attorney, the appellee would impose a rule that requires an attorney to answer and defend a number of charges, not related to his moral character and fitness to practice, but all bearing upon whether or not he has committed some specific acts of alleged misconduct. The scope of his practice, his reputation at the bar, and the general coverage of his services is not taken into consideration. Indeed, he is not even apprised of the fact that the central issue is not "guilt or innocence" with respect to the specified charges, but his "fitness to continue" in practice. Consequently, he is afforded no plenary hearing on the issue, and is not confronted by those accusing him of lack of good moral character (*Cramp* v. *Board of Public Instruction of Orange County, Fla.* (Fla. 1961), 82 S. Ct. 275, 368 U. S. 278, 7 L. Ed. 2d 285, on remand 137 So. 2d

828; *Willner* v. *Committee, supra; Schware* v. *Committee, supra; Konigsburg* v. *State Bar of Calif., supra*).

In like manner, the provisions of Special Rule 12 of the Rules of the Appellate Division regulating the conduct of attorneys, is a statute for all intent and purposes in these proceedings, and has the effect of an act of the legislature (*Lathrop* v. *Donohue* (Wisc. 1961), 81 S. Ct. 1826, 367 U. S. 820, 6 L. Ed. 2d 1191, rehearing denied 82 S. Ct. 23, 368 U. S. 871, 7 L. Ed. 2d 72). Similarly situated are the charter of the appellee, and the appellee's by-laws, *infra,* Appendix F, pages 35a and 36a. See also *Barrows* v. *Johnson,* 346 U. S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031; *Lane* v. *Johnson,* 283 N. Y. 244, 28 N..E. 705; *98 A. L. R. 411,* as to unfairness and corruption of officers in performance of administrative functions in civil or criminal cases in state court, in violation of the 14th amendment.)

The vagueness of the charge "engaging in the practice of issuing worthless checks" speaks for itself. In addition, the case law in the First Judicial Department of New York is that it makes no difference whether or not an attorney has made good the check, or whether or not the check was post-dated, if it was returned by the bank there are no extenuating or mitigating circumstances (*Matter of Healy,* 11 A. D. 2d 4, 201 N. Y. S. 2d 532); consequently there is no defense to such a charge, and, since that is so, the charge fails to meet the requirements set up by the New York State Court of Appeals in order for a statute to meet the requirements of due process:

> "Another prime prerequisite of due process is that the statute sought to be enforced must give reasonable notice of what must be done and what must be avoided and how a charge of doing what's forbidden, or of not doing what's required, may be defeated." *People* v. *Greenwald,* 299 N. Y. 271, 86 N. E. 2d 745.

See also *Cramp* v. *Board of Public Instruction of Orange County, Fla., supra,* where the Supreme Court of the

United States struck down a Florida loyalty oath statute because it was "too vague to be enforceable".

The "unreasonable search and seizure" issue raised by the appellant is substantial. As recently as March 31, 1966, the same appellate division that refused, on two occasions to grant appellant a motion to suppress, ruled that search and seizure applies to administrative proceedings involving penalties, forfeitures, or other sanctions for violations of laws and regulations. The case is not yet officially reported, but appeared in the *New York Law Journal,* Vol. 155—No. 71, for April 12, 1966, at page 1, and is entitled: *Leogrande, Jr.,* v. *State Liquor Authority of the State of New York.*

The Supreme Court of the United States has long refused to go along with erratic and discriminatory application of state statutes and rules. Yet, the appellee advances the theory, and the state courts agreed with appellee, that because the subpoena power was being applied against an attorney, the statutes did not have to be complied with. Similarly, appellee took the attitude that although Special Rule 12, *supra,* sets forth the manner in which appellee can issue subpoenas, appellee did not have to comply; after appellee was caught in its illegal activity, it further attempted to cover up by producing a witness, one of its staff attorneys, Louis B. Reynolds, who testified that he removed all of the original subpoenaes, which would have borne the court clerk's signature and seal, and the affidavits of service, for which appellee alleged and testified that it paid and destroyed them for the reason that the file was getting too thick (Stenographic Record, pp. 852-875; 890-893). See also, *National Association for the Advancement of Colored People* v. *Alabama ex rel. Flowers* (1964), 84 S. Ct. 1302, 377 U. S. 288, 121 L. Ed. 2d 325; *National Assoc. for the Advancement of Colored People* v. *State of Alabama, ex rel. Patterson,* 78 S. Ct. 1163, 357 U. S. 449, 2 L. Ed. 2d 1488; *Barr* v. *City of Columbia* (S. C. 1964) 84 S. Ct. 1734, 378 U. S. 146, 12

L. Ed. 2d 766. Consequently, there has never been any competent proof as to either issuance or service of the subpoenaes, in accordance with the statutes (CPA. 413, 403, 411; Rule 12, Special Rules, etc., Appendix F, *infra*). In asserting its position that attorneys' are not privileged to raise constitutional objections to inquiries into alleged professional misconduct, appellee overlooks the fact that in all of the situations in which there has been a decision on the point, what was involved was not a disciplinary proceeding in which the attorney could end up with a penalty or forfeiture, but a judicial inquiry, ordered by an appellate division to encompass all attorneys within that appellate division engaged in the practice inquired into to the extent set forth in the order authorizing the inquiry. Therefore, there was no penalty or forfeiture directly involved (*Matter of Cohen*, 7 N. Y. 2d 488). Also, the parties subpoenaed had notice of the inquiry and could attack the subpoenaes before they were returnable. That situation did not exist in this proceeding. Appellant knew nothing of the subpoenas until after appellee had received all of the information, through the mail, and acted upon it to the extent of preferring charges against appellant based upon the material appellee received pursuant to the subpoenaes, and kept. In addition, *Matter of Cohen, supra*, did not revoke an attorney's right to claim his privilege, it merely stated that if he invoked it, he could be disbarred. Therefore, the privilege is still with the attorney, and not with the appellee, and the appellee, therefore, has no right to violate an attorney's constitutional rights solely because he is an attorney, and appellee feels he can't invoke them. (*One 1958 Plymouth Sedan* v. *Commonwealth of Pa.* (1965), 85 S. Ct. 1246, 380 U. S. 693, 14 L. Ed. 2d 170, on remand 211 A. 2d 536, 418 Pa. 457; *Willner* v. *Committee, supra; Schware* v. *Board of Bar Examiners, supra; Konigsburg* v. *State Bar of Calif., supra*).

This Court has jurisdiction to review the order of the Court of Appeals of the State of New York appealed from

herein (*Haynes* v. *State of Washington* (1963), 83 S. Ct. 1336, 373 U. S. 503, 10 L. Ed. 2d 513; *Niemotho* v. *State of Maryland* (1951), 71 S. Ct. 325, 340 U. S. 268, 95 L. Ed. 280; *Hoyt* v. *Florida, supra; National Association for the Advancement of Colored People* v. *Alabama ex rel. Flowers, supra; Metlankatla Indian Community, Annette Island Reserve* v. *Egan* (1962), 82 S. Ct. 552, 369 U. S. 45, 7 L. Ed. 2d 562).

What the appellee has argued and been upheld in thus far, is that its authority to keep surveillance over attorneys is unchallengeable, and that its decisions and those of the appellate division with respect to disciplining attorneys are not subject to review, except with approval of either the appellee or the appellate division. Such a position is untenable, and raises a constitutional question of the first magnitude, since such an unbridled authority, per se, violates the 14th amendment to the constitution.

From research and inquiry, it seems that State Courts have exercised such autonomy in disciplinary proceedings that there is little or no precedent in the Federal Courts and in the Supreme Court to use for comparison to show to what extent the situation herein differs from the standards prescribed by the Supreme Court for the conduct of such activity. Consequently, appellant has had to rely upon the fact situation herein, rather than upon precedent.

Conclusion

The constitutional questions raised on the appellant's appeal to the Court of Appeals of the State of New York, and to this Court, are important to appellant and to the Bar in general. The procedure used by the appellee in getting appellant's bank records is the rule, rather than the exception, in so far as the appellee's actions with respect to initiating disciplinary proceedings is concerned. Appellee has exercised a power of subpoena far broader than the appellate division, its grantor of power, could

exercise, and in effect has admitted the use of such power, and demurred to appellant's objections to such use, on the basis that as an attorney, appellant has no constitutional rights he can effectively assert. Appellee takes no consideration of the fact that what it is doing is really a discovery and inspection and not an investigation pursuant to subpoena duces tecum; conversely, any other organization, agency, authority, court, committee, or whatever, that sought to exercise the same power could do so only under Court order. The state Courts seem reluctant to tackle the question, as is evidenced by the fact that they did not answer a single legal proposition put to them in the whole of this six-year proceeding. Therefore, unless this Court acts, appellant will have been compelled to forever forfeit his license to practice his chosen profession, without due process of law, and other attorneys will continue to be continuously subjected to the same type inquisitorial treatment which appellant has undergone.

The federal questions presented by this appeal are substantial, and of public importance; some have not previously been argued before or decided by this Court, and they require plenary consideration, briefs on the merits and oral argument.

Respectfully submitted,

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(212) 565-3618.

New York, New York,
April 13, 1966.

APPENDICES

APPENDIX A

1. Opinion of Court of Appeals of the State of New York

(16 N. Y. 2d 829, 263 N. Y. S. 2d 172)

Motion No. 557—July 9, 1965

In the Matter of Richard Howard Jones, An Attorney, Appellant, v. The Association of the Bar of the City of New York, Respondent.

Court of Appeals of New York,
July 9, 1965.

Appeal from Supreme Court, Appellate Division, First Department, 22 A. D. 2d 533, 256 N. Y. S. 2d 972.

Disciplinary proceeding was brought against attorney.

The Appellate Division held that record warranted disbarment of attorney and disbarred the attorney.

The attorney appealed to the Court of Appeals, and motions were made in the Court of Appeals for a stay, to amend order to show cause for a stay, and to dismiss appeal.

Motion brought on by order to show cause for a stay denied. Motion to amend order to show cause denied. Motion to dismiss appeal granted and appeal dismissed upon the ground that no substantial constitutional question is directly involved.

2. Decree of the Court of Appeals of the State of New York

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of July, A. D. 1965.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 557

In the Matter of

RICHARD HOWARD JONES, An Attorney,
Appellant,

The Association of the Bar of the City of New York,
Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, upon the ground that no substantial constitutional question is directly involved.

SEAL

A copy

RAYMOND J. CANNON,
Clerk.

APPENDIX B

Opinion of the Appellate Division of the Supreme Court of the State of New York

(22 A. D. 2d 433, 256 N. Y. S. 2d 972)

Motions 6 and 7, March 4, 1965

As Corrected March 9, 1965

In the Matter of RICHARD HOWARD JONES, *An Attorney*

Supreme Court, Appellate Division, First Department

March 4, 1965

As Corrected March 9, 1965

Disciplinary proceeding. The Supreme Court, Appellate Division, held that record warranted disbarment.

Attorney disbarred.

Attorney and Client—39, 44(2)

Issuance of worthless checks over a period of time and the conversion of funds belonging to several clients warranted disbarment notwithstanding eventual payment of these funds to clients following complaints.

JOHN G. BONOMI, New York City, of counsel (RAYMOND P. WHEARTY, New York City, on the brief) for petitioner The Association of the Bar of the City of New York.

H. HAWTHORNE HARRIS, New Rochelle, for respondent.

Before BOTEIN, P J., and BREITEL, VALENTE, MCNALLY and STEVENS, JJ.

Per Curiam.

Respondent was admitted to practice December 16, 1953 in the Second Judicial Department. Certain charges were preferred against his in an original petition dated June 7, 1960 and in a supplemental petition dated May 9, 1961 and

a second supplemental petition dated November 21, 1961. These charges were heard before an officer who was duly appointed for that purpose. The charges alleged commingling of clients' funds with the personal funds of the respondent on several occasions and the issuance of checks in excess of 140 which were returned either because of insufficient funds or because the accounts were closed. The charges with respect thereto were sustained by the Hearing Officer and are confirmed by this court. In addition it was charged in the original petition respondent had been guilty of professional misconduct with respect to the use of certain monies of one William Cheeseboro, a client. Respondent was paid a flat fee of $150 by Cheeseboro for professional services. Thereafter he received a $500 check in settlement of Cheeseboro's claim which he cashed and converted the proceeds thereof to his own use. Eventually Cheeseboro was paid. The charge of professional misconduct is sustained in its entirety. To the extent the report of the Hearing Officer finds the contrary, such finding is disaffirmed, and is otherwise confirmed. Respondent also improperly used or improperly retained for his own purposes monies belonging to one William Newsome and Carry-On-Community Club, Inc., and failed to make timely payment of certain taxes for which purpose he received that money. The charges in connection therewith are fully sustained. The report of the Hearing Officer on these charges is confirmed except insofar as he makes a contrary finding. To that extent it is disaffirmed. It was also charged that in connection with the purchase of a picture or pictures from one Meyerson he issued two checks which were returned unpaid because of insufficient funds. Insofar as the Hearing Officer sustained the charge the finding is confirmed.

Opinion of the Appellate Division of the Supreme Court of the State of New York

It was charged that the respondent had represented to a client that she might obtain a divorce in South Carolina without either the client or her husband going to South Carolina and that in connection therewith a fee was paid to the respondent, the refunding of which the respondent attempted by the issuance of two checks which were returned unpaid because of insufficient funds. Except for that portion of the charges as to the representation that the parties could obtain a divorce without going to South Carolina, which decree would be valid in New York, the charge was sustained and the report of the Hearing Officer is confirmed.

It is apparent that the respondent over a period of time has engaged in the practice of issuing worthless checks and that he has converted to his own use funds belonging to several of his clients. The fact that payment was eventually made, following complaints, does not change the nature of the offense. Respondent has been guilty of professional misconduct which demonstrates his unfitness to continue in the practice of law. The respondent should be disbarred.

Respondent disbarred effective April 5, 1965. All concur.

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 4th day of March, 1965.

Present:

HON. BERNARD BOTEIN,
Presiding Justice.
" CHARLES D. BREITEL,
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
Justices.

6 and 7

In the Matter

of

RICHARD HOWARD JONES,

an Attorney.

The Association of the Bar of the City of New York, by Eric Nightingale, Esq., its attorney, having presented to this Court on the 7th day of June, 1960, a petition containing charges of professional misconduct against the above-named respondent, Richard Howard Jones, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 16th day of December, 1953, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the re-

spondent having appeared herein in person and having interposed an answer to said petition, duly verified the 7th day of June, 1960; and the Court having duly made and entered an order on the 5th day of July, 1960, appointing Hon. John A. Mullen as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and thereafter and on the 9th day of May, 1961, the petitioner, The Association of the Bar of the City of New York, having presented to this Court a supplemental petition containing additional charges of professional misconduct against the above-named respondent; and the respondent having appeared herein in person and having interposed an answer to said supplemental petition, duly verified the 5th day of May, 1961; and this Court having duly made and entered an order on the 25th day of May, 1961, appointing Hon. John A. Mullen as Referee herein to take testimony in regard to said additional charges and to report to this Court his opinion thereon; and thereafter and on the 21st day of November, 1961, the petitioner, The Association of the Bar of the City of New York, having presented to this Court a second supplemental petition containing additional charges of professional misconduct against the above-named respondent; and the respondent having appeared herein by his attorney, H. Hawthorne Harris, Esq., and having interposed an answer to said second supplemental petition, duly verified the 5th day of December, 1961; and the Court having duly made and entered an order on the 12th day of December, 1961, appointing Hon. John A. Mullen as Referee herein to take testimony in regard to said additional charges and to report to this Court his opinion thereon; and thereafter and on the 9th day of January, 1963, an order of this Court having been made and entered modifying the orders of this Court entered on July 5, 1960, May 25, 1961 and December 12, 1961, so as to designate Hon. John A. Mullen, a Justice of the Supreme Court of

the State of New York, to take testimony in this proceeding in regard to the charges contained in the petition, supplemental petition and second supplemental petition and to report the same with his opinion thereon to this Court; and hearings pursuant to said orders of reference and order of designation having been duly held before the said Referee and Justice of the Supreme Court and the said Referee and Justice of the Supreme Court having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report and supplemental report thereon to this Court, which reports were dated the 29th day of May, 1963, and the 6th day of December, 1963, and were filed in the office of the Clerk of this Court on the 29th day of May, 1963, and the 9th day of December, 1963;

And the petitioner thereafter and on the 3rd day of September, 1964, having moved for an order confirming in part and disaffirming in part the Referee's reports and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having cross-moved for an order confirming in part and disaffirming in part the Referee's reports and dismissing the petition, supplemental petition and second supplemental petition;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 31st day of May, 1960, the affidavit of Eric Nightingale, Esq., annexed thereto, sworn to the 27th day of May, 1960, the notice of presentation of said petition, dated the 31st day of May, 1960, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 7th day of June, 1960, the order of this Court, dated the 5th day of July, 1960, appointing Hon. John A. Mullen, as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 5th day of July, 1960, the supplemental petition

of the Association of the Bar of the City of New York, verified the 19th day of April, 1961, the affidavit of Eric Nightingale, Esq. annexed thereto, sworn to the 17th day of April, 1961, the notice of presentation of said supplemental petition, dated the 19th day of April, 1961, with proof of due service thereof upon the respondent, the answer of the respondent to said supplemental petition, verified the 5th day of May, 1961, the order of this Court, dated the 25th day of May, 1961, appointing Hon. John A. Mullen, as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 25th day of May, 1961, the second supplemental petition of The Association of the Bar of the City of New York, verified the 14th day of November, 1961, the affidavit of Eric Nightingale, Esq. annexed thereto, sworn to the 13th day of November, 1961, the notice of presentation of said petition, dated the 14th day of November, 1961, with proof of due service thereof upon the respondent, the answer of the respondent to said second supplemental petition, verified the 5th day of December, 1961, the order of this Court, dated the 12th day of December, 1961, appointing Hon. John A. Mullen as Referee herein all of which papers were duly filed in the office of the Clerk of this Court on the 12th day of December 1961, the order of this Court entered on the 9th day of January, 1963, modifying the orders of this Court entered on July 5, 1960, May 25, 1961 and December 12, 1961, so as to designate Hon. John A. Mullen, a Justice of the Supreme Court of the State of New York, to take testimony in this proceeding in regard to the charges contained in the petition, supplemental petition and second supplemental petition and to report the same with his opinion thereon to this Court; the report of Hon. John A. Mullen, as a justice of the Supreme Court designated herein, dated the 29th day of May, 1963, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of

this Court on the 29th day of May, 1963; the supplemental report of Hon. John A. Mullen, as a Justice of the Supreme Court designated herein, dated the 6th day of December, 1963, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 9th day of December, 1963, and his decision dated June 4, 1963 disposing of a motion had before him during the hearings and filed in the office of the Clerk of this Court on the 5th day of June, 1963, and upon reading and filing the notice of motion for an order confirming in part and disaffirming in part the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 11th day of May, 1964, with proof of due service thereof, and the notice of cross-motion for an order confirming in part and disaffirming in part the report of the Referee and dismissing the petition, supplemental petition and second supplemental petition, dated the 21st day of May, 1964, with proof of due service thereof, and after hearing Mr. John G. Bonomi for the motion to adjudge respondent guilty of professional misconduct, and Mr. H. Hawthorne Harris opposed, and cross moving to dismiss the three petitions heretofore mentioned and due deliberation having been had thereon; and upon all the proceedings heretofore had herein, and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the said Richard Howard Jones be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective April 5, 1965, and it is further unanimously

Ordered that the name of said Richard Howard Jones be struck from the roll of attorneys and counselors-at-law

in the State of New York effective April 5, 1965; and it is further unanimously

Ordered that the said Richard Howard Jones be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective April 5, 1965; and it is further unanimously

Ordered that the said Richard Howard Jones be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority effective April 5, 1965; and it is further unanimously

Ordered that the said Richard Howard Jones be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto effective April 5, 1965.

Enter,

VINCENT A. MASSI,
Clerk.

Orders of Appellate Division, First Department Extending Effective Date of Disbarment

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department in the County of New York on the 5th day of April, 1965.

Present:

HON. BERNARD BOTEIN, *P. J.*
HON. CHARLES D. BREITEL
HON. FRANCIS L. VALENTE
HON. JAMES B. M. MCNALLY
HON. HAROLD A. STEVENS

Justices.

In the Matter

of

RICHARD HOWARD JONES,

An Attorney.

Upon reading the annexed affidavit of Richard Howard Jones, duly sworn to the 2nd day of April, 1965, and upon the Order of Disbarment entered herein on the 4th day of March, 1965, and upon all of the pleadings and proceedings heretofore had herein, it is hereby,

ORDERED, that the effective date of the said Order of Disbarment, dated March 4, 1965 be and the same hereby is extended to the 5th day of May, 1965, to permit the Respondent to dispose of the following matters; Phillips vs. Andrews; Boucher vs. Goldberg; Johnson vs. Johnson and Richardson vs. Richardson, and it is further

Orders of Appellate Division, First Department Extending Effective Date of Disbarment

ORDERED, that in the interim, Respondent is not to engage in any new matters, nor is he to appear in any Court as attorney or counsel, except in the aforementioned cases.

Enter,

/s/ BERNARD BOTEIN,
Presiding Justice of the
Appellate Division of the Supreme Court.

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department in the County of New York on the 7th day of May, 1965.

Present:

HON. BERNARD BOTEIN, *P. J.*
HON. CHARLES D. BREITEL
HON. FRANCIS L. VALENTE
HON. JAMES B. M. MCNALLY
HON. HAROLD A. STEVENS

Justices.

In the Matter of

RICHARD HOWARD JONES,

An Attorney.

ORDER

Upon reading and filing the annexed affidavit of Richard Howard Jones, duly sworn to the 5th day of May, 1965,

Orders of Appellate Division, First Department Extending Effective Date of Disbarment

and upon the Exhibits A to C, annexed thereto, and upon the Order of Disbarment entered herein on the 4th day of March, 1965, as extended by an order of this Court, entered April 5, 1965, and upon all of the pleadings and proceedings heretofore had herein, it is hereby

ORDERED, that the effective date of the said Order of Disbarment, dated March 4, 1965, as extended by the Order of this Court entered April 5, 1965, be and the same hereby is extended to the 28th day of May, 1965, to permit the Respondent to wind up his affairs as an attorney-at-law, in all respects, and it is further

ORDERED, that in the interim, Respondent is not to engage in any new matters, nor is he to appear in any Court as Attorney or counsel, except in the four (4) matters in which he was attorney of record prior to March 4, 1965, as set forth in the order of April 5, 1965.

Enter,

/s/ BERNARD BOTEIN.

APPENDIX C

Opinion of the Court of Appeals of the State of New York Dismissing Appeal (1962)

(230 N. Y. S. 2d 209, 11 N. Y. 2d 1054, 184 N. E. 2d 182)

Motion No. 383, June 12, 1962

In the Matter of RICHARD HOWARD JONES, an Attorney, Appellant. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Respondent.

Argued June 11, 1962; decided June 12, 1962.

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 20, 1962, which denied a motion by appellant to strike out certain charges and allegations contained in the original petition, the supplemental petition and the second supplemental petition in a disciplinary proceeding, and to suppress the evidence relating to the afore-mentioned charges.

Eric Nightingale for motion.

Richard Howard Jones, in person, and *H. Hawthorne Harris* opposed.

Motion granted and appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

Order of Court of Appeals Dismissing Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 12th day of June A. D. 1962.

Present:

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 383

In the Matter of

RICHARD HOWARD JONES, *An Attorney*

Appellant,

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and after having heard H. Hawthorne Harris, Esq., in opposition to said motion and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

A copy

GEARON KIMBALL
Deputy Clerk

Appellate Division Order Dismissing Appeal to the Supreme Court of the United States

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 18th day of December, 1962.

Present:

HON. BERNARD BOTEIN,
Presiding Justice
" CHARLES D. BREITEL,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
Justices

In the Matter of

RICHARD HOWARD JONES, *An Attorney.*

The Association of the Bar of the City of New York, petitioners in the above-entitled action, having moved this Court for an order dismissing the appeal taken by the respondent to the Supreme Court of the United States, pursuant to 28 U. S. C. Section 1257(2), from an order of the Court of Appeals of the State of New York, entered June 12, 1962, granting a motion by petitioner, the Association of the Bar of the City of New York, to dismiss an appeal theretofore taken by the respondent as of right from an order of this Court, duly made and entered herein on March 20, 1962.

Now, upon reading and filing the order to show cause, dated November 30, 1962, with proof of due service thereof, and the affidavit of Raymond P. Whearty in support of

said motion, and the affidavit of H. Hawthorne Harris in opposition thereto, and after hearing Mr. Raymond P. Whearty for the motion and Mr. H. Hawthorne Harris opposed,

It is ordered that the said motion to dismiss respondent's appeal pending in the Supreme Court of the United States is granted.

Enter:

VINCENT A. MASSI
Clerk.

Appellate Division's Order Denying Motion to Suppress

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of March, 1962.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices

5

In the Matter of

RICHARD HOWARD JONES, *An Attorney.*

The above-named respondent, having moved this Court for an order granting the respondent leave to strike out

the charges and allegations set forth in subdivisions 6, 7 and 8 of paragraph IV of the original petition herein, dated the 31st day of May, 1960, and charges Nos. 5, 6, and 7 of the Supplemental Petition, dated the 19th day of April, 1961, and paragraphs 8 and 9 of charge No. 9, set forth in the Second Supplemental Petition herein, dated the 14th day of November, 1961, and further granting the respondent an order to suppress the evidence in the hands of the petitioner relating to the aforementioned charges, and for other relief.

Now, upon reading and filing the order to show cause, dated January 17, 1962, with proof of due service thereof, the affidavit of Richard Howard Jones, sworn to the 15th day of January, 1962, and the affidavits of H. Hawthorne Harris, sworn to the 15th day of January, 1962, and the 5th day of Febrduary, 1962, in support of said motion, and the affidavit of Eric Nightingale, sworn to the 30th day of January, 1962, in opposition thereto, and after hearing Mr. H. Hawthorne Harris for the motion, and Mr. Eric Nightingale, appearing on behalf of The Association of the Bar of the City of New York, opposed,

It is ordered that the said motion be and the same hereby is denied in all respects. The stay contained in the order to show cause, dated January 17, 1962, is vacated.

Enter:

VINCENT A. MASSI,
Clerk.

APPENDIX D

Referee's Order Denying Motion to Suppress (1964)

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter

of

RICHARD HOWARD JONES,

An Attorney.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter

of

RICHARD HOWARD JONES,

An Attorney.

MULLEN, *J.*

The above-entitled matter was referred to the undersigned by orders of the Appellate Division, First Department, dated July 5, 1960, May 25, 1961 and December 12, 1961 to take testimony as Referee with respect to charges of professional misconduct presented by The Association of the Bar of the City of New York and to report the same with my opinion thereon to the Court. By order of the Appellate Division, First Department, dated January 9, 1963, the aforesaid orders dated July 5, 1960, May 25, 1961 and December 12, 1961, were modified so as to designate the undersigned, a Justice of the Supreme Court of the State of New York, to take testimony in this proceeding in regard to the charges contained in the petition,

supplemental petition and the second supplemental petition and to report the same with my opinion.

Respondent having submitted, during hearings held pursuant to said modified order of appointment, a combined memorandum of law and statement of facts which was deemed by me to be a motion to suppress the evidence relating to the charges set forth in paragraph "IV", subdivisions "(6)", "(7)" and "(8)", of the original petition herein, dated the 31st day of May, 1960, and to charges Nos. "5", "6" and "7" of the supplemental petition, dated the 19th day of April, 1961, and to charge No. "9", subdivisions "8" and "9" thereof, set forth in the second supplemental petition herein, dated the 14th day of November, 1961, and for leave to physically remove Exhibits A and B of the petition, above described, Exhibits A and B of the supplemental petition, and Exhibits C and D of the second supplemental petition, above described, and for leave to strike out from the record of these proceedings, all testimony relating to the charges above set forth, and any and all exhibits relating thereto, such testimony commencing with the hearing of March 1, 1963 and continuing through April 4, 1963, commencing at page 556 of the Record of the hearings in these proceedings,

Now, on reading and filing the said combined memorandum of law and statement of facts, dated May 10, 1963, submitted on behalf of the respondent by H. Hawthorne Harris, Esq., attorney for the respondent, a memorandum submitted in opposition thereto by John G. Bonomi, Esq., attorney for the petitioner, The Association of the Bar of the City of New York, by Raymond P. Whearty, Esq., of counsel, and a reply memorandum, dated May 18, 1963 submitted on behalf of the respondent, and due consideration having been given thereto, it is now

ORDERED that the said motion be, and it hereby is, in all respects denied.

Dated, June 4, 1963.

JOHN A. MULLEN,
J. S. C.

APPENDIX E

Appellate Division Orders Extending Time to Docket Appeal and File Jurisdictional Statement

ORDER

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York, on the 13th day of December, 1965.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,
" JAMES B. M. McNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

In the Matter of

RICHARD HOWARD JONES, An Attorney,
Respondent-Appellant,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Petitioner-Appellee.

Upon reading and filing the annexed affidavit of Richard Howard Jones, sworn to the 10th day of December, 1965, and the affirmation of Ralph B. Raukx, Esquire, dated December 10, 1965, and the affirmation of service by mail of Ralph B. Raukx, Esquire, dated December 11, 1965, and

Appellate Division Orders Extending Time to Docket Appeal and File Jurisdictional Statement

upon all of the pleadings and proceedings heretofore had herein, it is hereby

ORDERED, that the respondent-appellant's time in which to docket his appeal to the Supreme Court of the United States, and to file a jurisdictional statement with respect to the appeal, be and the same hereby is enlarged to and including the 12th day of February, 1966, without prejudice to any of appellee's rights with respect to the appeal.

Enter:

s/ BERNARD BOTEIN.

Appellate Division Orders Extending Time to Docket Appeal and File Jurisdictional Statement

ORDER

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York, on the 21st day of February, 1966.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

In the Matter of

RICHARD HOWARD JONES, An Attorney,
Respondent-Appellant,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Petitioner-Appellee.

Upon reading and filing the annexed affidavit of Richard Howard Jones, sworn to the 14th day of February, 1966, and the affirmation of Ralph B. Raukx, dated February 14, 1966, and upon all of the pleadings and proceedings heretofore had herein, it is hereby

ORDERED, that the respondent-appellant's time in which to docket his appeal to the Supreme Court of the United States, and to file a jurisdictional statement with respect

Appellate Division Orders Extending Time to Docket Appeal and File Jurisdictional Statement

to the appeal, be and the same hereby is further enlarged and extended to and including the 31st day of March, 1966, without prejudice to any of appellee's rights with respect to the appeal.

Enter:

S/ BERNARD BOTEIN.

ORDER

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York on the 31st day of March, 1966.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

In the Matter of

RICHARD HOWARD JONES, An Attorney,
Respondent-Appellant,
against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Petitioner-Appellee.

Upon reading and filing the annexed affidavit of Richard Howard Jones, sworn to the 30th day of March, 1966, and

Appellate Division Orders Extending Time to Docket Appeal and File Jurisdictional Statement

Exhibit A, annexed thereto, and upon all of the pleadings and proceedings heretofore had herein, it is hereby

ORDERED, that the respondent-appellant's time in which to docket his appeal to the Supreme Court of the United States, and to file a jurisdictional statement with respect to the appeal, be, and the same hereby is further enlarged and extended to and including the 15th day of April, 1966, without prejudice to any of appellee's rights with respect to the appeal.

Enter:

s/ BERNARD BOTEIN.

APPENDIX F

Federal Statutes

28 U. S. C. 1257(2) SUPREME COURT—JURISDICTION

§ 1257. STATE COURTS: APPEAL: CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

• • •

June 25, 1948, c. 646, 62 Stat. 929.

New York State Statutes

29 MCKINNEY'S LAWS, 107-109, AS AMENDED.

§ 90. ADMISSION TO AND REMOVAL FROM PRACTICE BY APPELLATE DIVISION

• • •

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or sup-

pression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

* * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally

within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at anytime within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of

attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon. As amended L.1949, c. 701, § 1; L.1958, c. 960, § 24; L.1961, c. 733; L.1962, c. 310, §§ 205, 206, eff. Sept. 1, 1963.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

* * *

VOL. 4 GILBERT-BLISS, p. 249, AS AMENDED

§ 588. APPEAL AS OF RIGHT

Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States; or

* * *

New York State Statutes

(Am. L. 1944, ch. 528, in effect April 5.)

VOL. 7B MCKINNEY'S LAWS, PAGE 228

§ 5501. SCOPE OF REVIEW

* * *

(b) *Court of Appeals.* The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. * * *

VOL. 7B MCKINNEY'S LAWS, PAGE 496

§ 5601. APPEALS TO THE COURT OF APPEALS AS OF RIGHT

(a) *Dissent, reversal or modification.* An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency, from an order of the appellate division which fianlly determines the action, where there is a dissent or such order directs reversal of the judgment or order appealed from or directs modification of such judgment or order.

(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

* * *

(As amended L.1963, c. 532, 39.)

* * *

New York State Statutes

VOL. 12 GILBERT-BLISS, 1965 SUPP.

SPECIAL RULES GOVERNING THE CONDUCT OF ATTORNEYS IN THE FIRST JUDICIAL DEPARTMENT

XII. *Preliminary investigation of professional misconduct on the part of an attorney. Subpoenas and examination of witnesses under oath.* Upon application by the chairman or acting chairman of the Committee on Grievances of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee is conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths. Effective July 1, 1960.

CIVIL PRACTICE ACT—ARTICLE 33

§ 403. ISSUANCE OF SUBPOENA.

A subpoena is a process in the name of the court, referee, body or other person authorized by law to issue the same,

requiring the attendance of a witness at the trial or hearing of a cause or the hearing of a motion or before a referee or other person where proof or the production of books, papers or other documents is required. In addition to all other provisions of law relating to the issuance of subpoenas, a subpoena may be issued by the attorney for a party to any action or special proceeding in the name of the court or referee in like manner and with the same effect as if issued by and under the hand of the court, judge or justice thereof, or referee. Such subpoena shall be subscribed in the name of the attorney together with his office address and shall identify the party for whom he appears.

§ 404. Service of Subpoena Issued Out of a Court.

A subpoena, issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:

1. A copy of the subpoena must be delivered to the witness.

2. The fees allowed by law for mileage and for one day's attendance, must be paid or tendered to him.

* * *

§ 406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons in Certain Cases.

1. When a judge, * * * referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testi-

mony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for the service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

* * *

§ 411. Production of Book of Account Upon Trial or Hearing.

A person shall not be compelled to produce upon a trial or hearing a book of account, otherwise than by an order requiring him to produce it or a subpoena duces tecum. Such a subpoena must be served at least five days before the day when he is required to attend. At any time after service of such a subpoena or order, the witness may obtain, upon such a notice as the judge, referee or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpoena or the order for production, upon such terms as justice requires touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause and authorized to hear testimony. A justice of the peace, or other judge of a court of record, may make such an order in an action brought in his court at any time after the commencement thereof.

* * *

New York State Statutes

§ 413. Production of Corporation Book or Paper on Trial.

The production upon a trial, of a book or paper belonging to or under the control of a corporation, may be compelled in like manner as if it was in the hands, or under the control, of a natural person. For that purpose, a subpoena duces tecum, or an order made as prescribed in the last section but one, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is.

Chapter 819, Sec. 1, Laws of 1871, as Amended by Chapter 134, Laws of 1924

(*An Act to Incorporate The Association of the Bar of the City of New York.*)

Section 3. Such corporation shall have the power to make and adopt a constitution, bylaws, rules and regulations for the admission, government, suspension, and expulsion of its members.

* * *

By-Laws of the Association of the Bar of the City of New York

§ XIII(16). A Committee on Grievances of twenty-one members and a chairman. The Committee shall have the power to consider and investigate the conduct of any member of the association wherever he may be practicing and any other attorney who resides or maintains an office within the City of New York, or was admitted to practise in the First Judicial Department. The Committee on Grievances shall also have power to consider and investigate methods of preventing the unlawful practise of the law by corporations and by any person not regularly admitted to practise, as an attorney or counselor, in the courts of record of the State, and to consider and investigate instances of such unlawful practise by any corporation or person. The Com-

mittee may itself initiate any investigation as aforesaid or may undertake the same upon complaint laid before it. If, after any such investigation, the commitee, or any subcommittee of the committee appointed for the purpose of conducting such investigation, shall so determine the Committee or such subcommittee may direct the attorney of the Committee to formulate a complaint to be presented to the Committee as provided by By-Law XVI.

• • •

§ XVI(2). COMPLAINTS OTHER THAN COMPLAINTS REFERRED TO IN SECTION 1 OF THIS BY-LAW.

(h) Whenever on the hearing of any complaint under this section 2 of this by-law, evidence shall be presented upon which, if not controverted, another charge or other charges against the respondent might be made, it shall not be necessary for the Committee on Grievances to prepare and serve such additional charge or charges on the respondent, but the Committee on Grievances or the subcommittee hearing the case may, after reasonable notice to the respondent and opportunity to answer, proceed to the consideration of such additional charge or charges against the respondent, as if they had been made and served at the time of service of the original charge, and may render such decision upon all of such charges as may be justified by the evidence in the case.

• • •

§ XVI(3). The Executive Committee may in its discretion in any case in which it deems the public interest requires prompt action, authorize an investigation or prosecution of an attorney in the courts without the preliminary investigation prescribed by the foregoing provisions of this by-law; provided that the resolution authorizing such investigation or prosecution be adopted by the affirmative vote of two-thirds of the members of the Executive Committee present at the meeting, and provided also that a quorum is present.

APPENDIX G

Constitutional and Other Statutory Provisions

1. United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," • • •

2. United States Constitution, Amendment XIV, Clause 1:

> "SECTION 1. • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

• • •

3. New York State Constitution, Article 1, Section 12:

> "[SECURITY AGAINST UNREASONABLE SEARCHES, SEIZURES AND INTERCEPTIONS.]
>
> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," • • •

4. New York State Constitution, Article 1, Section 1:

> "[RIGHTS, PRIVILEGES AND FRANCHISES SECURED.]
>
> "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured

to any citizen thereof unless by the law of the land, or the judgment of his peers."

* * *

5. New York State Constitution, Article 3, Section 15:

"[PRIVATE OR LOCAL BILLS TO EMBRACE ONLY ONE SUBJECT TO BE EXPRESSED IN TITLE.]

"No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title. Formerly Sec. 16, renumbered by Constitutional Convention of 1938; approved by the people Nov. 8, 1938."

6. New York State Constitution, Article 1, Section 6 (last paragraph):

"[GRAND JURY; PROTECTION OF CERTAIN ENUMERATED RIGHTS; WAIVER OR IMMUNITY BY PUBLIC OFFICERS; DUE PROCESS.]

* * *

"No person shall be deprived of life, liberty or property without due process of law. Amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938; amended and approved Nov. 8, 1949, eff. Jan. 1, 1950."

7. New York State Constitution, Article 6, Section 3:

"[JURISDICTION OF COURT OF APPEALS.]

* * *

"In civil cases and proceedings as follows:

"(L) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an

action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification." * * *

8. Civil Rights Law of the State of New York, Article 2, Section 8:

"RIGHT OF SEARCH AND SEIZURE.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. As amended L. 1923, c. 80, eff. March 23, 1923."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1223~~ 102

In the Matter

—of—

RICHARD HOWARD JONES, An Attorney,

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

JOHN G. BONOMI
Attorney for Appellee
The Association of the Bar
of the City of New York

RAYMOND P. WHEARTY
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1223

In the Matter

—of—

RICHARD HOWARD JONES, An Attorney,

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Pursuant to Rule 16, subdivision 1, of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss appellant's appeal from the New York Court of Appeals to this Court in the above entitled action on the grounds that (1) the appeal is not within the jurisdiction of this Court, because not taken in conformity to Revised Rule 13, subdivision 1, (2) the appeal presents no substantial federal questions and (3) the judgment rests on an adequate non-federal basis.

Preliminary Statement

In simplest outline, appellant's claims to have been subjected to unlawful search and seizure and denial of due process, in violation of his rights under the Constitutions of the United States and State of New York, are predicated upon the following facts: Appellee, in investigating seven complaints of professional misconduct on the part of appellant, each involving one or more checks issued by him which were returned unpaid, applied to the Clerk of the Appellate Division, First Department, who issued, pursuant to the Special Rules of that Court, subpoenas *duces tecum* directed to the banks involved, requiring them to produce transcripts of relevant accounts of appellant and lists of any returned checks drawn thereon. Such subpoenas were returnable before appellee's Committee on Grievances on dates the Committee was in session. Each subpoena bore a notation that the records called for might be furnished by mail in advance, in lieu of personal appearance on the return date. The subpoenas were duly served and, with one exception, complied with. In the exception, the bank was unable to comply at the time because its records were in process of transfer but subsequently, when the proceeding was pending before the Referee appointed by the Appellate Division, compliance was effected pursuant to a further subpoena, duly served, calling for production of the same records required by the original subpoena and bearing like notation as to production by mail in advance in lieu of personal appearance on the return date. At the hearings before the Referee a representative of each of the seven banks involved appeared, produced the copy of the questioned subpoena originally served upon the bank and was examined with regard thereto. Appellant

complains that all of the original subpoenas were not maintained intact in appellee's files.

But six of the twelve charges contained in the original and supplemental petitions in this case related to the practice of issuing worthless checks. The remaining six charges concerned conversions of sums received on behalf of clients (2 cases) or from clients for specific purposes (2 cases), issuance of specific checks to such clients in purported repayment of such sums, which checks were returned unpaid one or more times, misrepresentations, false statement to and false testimony before appellee's Committee on Grievances, undertaking to procure an out-of-state divorce for New York residents. The nature of these six charges and the extent to which they were found sustained by the Referee and by the Appellate Division appear at pages 3 to 6 of the affidavit of appellee's counsel, sworn to May 25, 1965, submitted in support of appellee's motion to dismiss appellant's appeal to the Court of Appeals, from whose order of dismissal appellant here appeals to this Court. That motion and supporting affidavit are listed in appellant's Notice of Appeal among the documents to be included in the record to be certified to this Court. Appellant's "Statement of Facts" (Jurisdictional Statement, pp. 12-16) is merely a recital of the chronology of the case below.

All page references hereafter, unless otherwise indicated, are to appellant's Jurisdictional Statement.

ARGUMENT

I.

Appellant's appeal herein is not within the jurisdiction of this Court because not taken in conformity to Revised Rule 13, Subdivision 1, of this Court.

By order dated December 13, 1965, appellant's time within which to docket his appeal to the Supreme Court of the United States, and to file a jurisdictional statement with respect to the appeal, was enlarged to and including February 12, 1966. The order was signed by the Presiding Justice of the Appellate Division, First Judicial Department, the Court in which appellant's Notice of Appeal to this Court was filed (pp. 22a-23a, 5). December 13, 1965, according to appellee's computation, was the sixtieth day following the filing of the Notice of Appeal (Revised Rule 34 (1)).

By order dated February 21, 1966, signed by the Presiding Justice of the Appellate Division, appellant's time to docket his appeal herein, and to file a jurisdictional statement with respect thereto, purportedly was further enlarged to and including March 31, 1966. The order recited that it was entered upon appellant's affidavit, sworn to February 14, 1966, and his counsel's affirmation, dated February 14, 1966 (pp. 24a-25a). Since February 12, 1966, a Saturday, was a legal holiday in New York and was followed by a Sunday, the recitals of the order would create the impression that the application, which was also dated February 14, 1966, was timely presented for signature. Under Revised Rule 34 (1), such application would have been timely had it been presented on February 14, 1966.

The papers submitted to the Appellate Division upon this application include a "Notice of Presentation For Signature", the body of which is as follows:

> "PLEASE TAKE NOTICE that an ex-parte Order, of which the within is a true copy, will be presented for signature to the Justices of the Appellate Division of the Supreme Court of the State of New York, First Department, at the Appellate Division Court House, East 25th Street @ Madison Avenue, New York, New York, *on the 16th day of February, 1966,* at 1:00 p.m., or as soon thereafter as counsel can be heard" (italics supplied).

Appellant's affidavit in support of the application for the proposed enlargement order alleged that the application was being made "for the reason that appellant (sic) time in which to docket the said appeal will expire this date, to wit: February 14, 1966, unless enlarged by this Court". The papers so submitted bore an affidavit of service by mail upon appellee on February 15, 1966. Appellee, however, has in its possession the envelope in which the copy served on it was received on February 16, 1966. The envelope is postmarked "FE 16 AM, 1966". Upon receipt of the copy so served, appellee served upon appellant's counsel by mail, and submitted to the Appellate Division, a memorandum calling that Court's attention to the provisions of Revised Rules 13 (1) and 34 (1) of this Court and questioning, in the circumstances, that Court's jurisdiction to sign the proposed order and grant the relief sought. Appellant filed no opposing memorandum nor, to its knowledge, was the validity of appellee's position otherwise questioned. Nevertheless, the Presiding Justice, on February 21, 1966, signed the proposed order of enlargement.

Subsequently, by order dated March 31, 1966, the Presiding Justice of the Appellate Division further enlarged appellant's time to docket his appeal, and file a jurisdictional statement with respect thereto (pp. 25a-26a). Upon receipt of a copy of the papers submitted on that application, on March 31, 1966, appellee again submitted to the Appellate Division a memorandum calling that Court's attention to Revised Rules 13 (1) and 34 (1) and questioning its jurisdiction to grant the relief sought. Again, appellant filed no opposing memorandum.

Appellee respectfully submits that appellant's application for an enlargement order, dated February 14, 1966, but presented to the Appellate Division for signature on February 16, 1966, was not in conformity to Revised Rule 13 (1) of this Court. A reading of Revised Rule 13 (1) would suggest, however, that only an application for enlargement "before the expiration of the original sixty-day period" may be presented to a judge of the Court whose decision is being appealed or in which the notice of appeal is filed and that any further such applications should properly be presented to a Justice of this Court. The latter, of course, was not here done. Under either interpretation, it is submitted, appellee has not proceeded in conformity to the Revised Rules applicable, that the Presiding Justice of the Appellate Division was without jurisdiction to make the enlargement orders, dated February 21 and March 31, 1966, and, accordingly, that this Court has not jurisdiction to entertain the instant appeal.

II.

The appeal herein presents no substantial federal questions.

The argument under this point will be directed to the contentions advanced by appellant, without numerical or other subdivision, under the heading "3. The Federal Questions are Substantial" (pp. 20-25). Such contentions will be considered in the order there set forth and will be numbered consecutively.

1. Appellant asserts that the Court of Appeals "was required to go into the merits of appellant's claim and determine whether or not the acts complained of constituted a breach of mandatory duty, or such denial of fundamental 'due process' as to compel the Court of Appeals to review the Appellate Division's order." He complains that no opinion was rendered as to why the constitutional questions raised were not substantial (p. 20). In reaching its determination that "no substantial constitutional question is directly involved" and dismissing appellant's appeal thereto (pp. 1a, 2a), the Court of Appeals cannot be presumed not to have considered the grounds for appeal urged, which were substantially as here urged. The fact that that Court rendered no lengthy or formal opinion is not evidence to the contrary. It is submitted that this point of appellant is without merit.

2. As "One of the first violations of the 'due process' clause", appellant next asserts that the Appellate Division reversed the Referee and reinstated two charges that the Referee had "dismissed at the end of the appellee's case, and in which the appellant did not testify because of the referee's rulings" (pp. 20-21). Appellant states that "Al-

though the Appellate Division reinstated the charges, it afforded the appellant no further opportunity to testify with respect to them". Appellant identifies the charges referred to as those relating to William Newsome and to The Carry-On Club, which the Appellate Division found fully sustained. Citing cases, appellant declares that it is "academic in law, that in a reversal of a nonsuit, a new trial must be ordered". To this contention appellee has several rejoinders.

The Referee did not "dismiss" any charges. Indeed, he had no power to do so. *Matter of Lynch,* 184 App. Div. 75 (1st Dept., 1918). He did find certain charges in part "not sustained". As appears at page 5 of the affidavit of appellee's counsel, sworn to May 25, 1965, in support of appellee's motion to dismiss appellant's appeal to the Court of Appeals herein (hereinafter referred to merely as Affidavit), which has been designated by appellant to be certified as part of the record presented to this Court, in the *Newsome* case, in which it was charged that appellant (1) commingled and converted the proceeds of a sale of real property in which he represented William Newsome, the seller, (2) misrepresented to the client that such proceeds had not been received, (3) subsequently issued to the client, in purported payment of the client's share, a check which was returned unpaid because of insufficient funds and (4) misrepresented to the client that a broker's $50 fee had been paid by money order when in fact appellant had issued to the broker his $50 check which was returned unpaid, the Referee found the charges sustained in every particular except conversion, as to which he stated on the record he would find that charge "not sustained because again it connotes some possible criminality which I do not

choose to make a finding with respect to" (Referee's Minutes, pp. 1328-1329). As stated, the Appellate Division found the charge fully sustained. Appellant does not advise this Court that his testimony regarding the *Newsome* charge covered forty-nine (49) pages of the record (Referee's Minutes, pp. 1278-1327). To tell this or any Court that the Referee dismissed the charge at the end of the appellee's case is, to say the least, not candid. Nor is it candid, in appellee's view, by means of the technically true but deceptive phrase that the Appellate Division afforded him no "further opportunity" to do so, to create the impression, as appellant does, that he was deprived of an opportunity to testify regarding the *Newsome* charge.

As appears at pages 5-6 of the same affidavit of appellee's counsel, in the *Carry-On Club* case appellant was charged with (1) having deposited in his own account a $200 check received from this client for payment of a statutory fee required for licensing as an insurance premium finance agency and (2) when notified that the client did not desire to pursue the matter and return of the license fee was demanded, having issued to his client a $200 check which was twice returned unpaid because of insufficient funds and was replaced with a like check, drawn on a different bank, which also was returned unpaid because of insufficient funds. At the hearings, the Referee announced that because of the witnesses' uncertainty as to the place and notice of meetings and whether appellant had carried out his commitments, he would find that part of the charge not sustained; as to the returned checks, however, he left the charge open. Appellant thereupon elected not to testify regarding the charge. Later, as regards appellant's unpaid checks to the client, the charge was found sustained as part of the "bad check" charges. The Appellate Division, having before it

the client's $200 check, in which the name of the payee was left blank when issued to appellant, and other documentary evidence as well as the testimony in that regard, found the charge sustained in full. There was, therefore, no "reversal of non-suit".

It may here be noted, in passing, that appellant does not make the same argument with respect to two other instances in which the Appellate Division "reversed" the Referee: In the *Cheeseboro* case, which involved an alleged conversion of $500 received in settlement of a client's claim and the issuance to the client of two checks in purported payment thereof which were returned unpaid, the Referee declined to find conversion because it imported criminality (Affidavit, p. 3). In the so-called *White-Delaware County* case, which involved appellant's alleged (1) conversion of $100 delivered to him by the client, Mrs. White, for payment of the balance of delinquent taxes in connection with the revesting of title to property, (2) insurance of a worthless personal $100 check to the County authorities in purported payment of such balance, (3) ignoring communications from such authorities regarding payment of appellant's protested check, (4) false statement in a letter to counsel for appellee's Committee on Grievances, and false testimony before the Committee on Grievances, that return of appellant's $100 check was caused by refusal of payment of a third party's check, received from the client, (5) failure, as of November 30, 1960, to pay or communicate with the Delaware County authorities and (6) failure to respond to a communication from counsel for the Grievance Committee, the Referee also declined to find conversion or that appellant submitted a false statement or testified falsely, as charged, because it imported criminality

(Affidavit, p. 4). In both instances the Appellate Division found the charges sustained in full.

Appellant appears to regard the reports of the hearing officer, the Referee, as the equivalent of a final order from which an appeal was taken, and the Appellate Division's decision and order as a modification or reversal, in the course of which new facts were found. Such, of course, is not the fact. Moreover, the hearing officer's reports were in no way binding upon the Appellate Division, which was required itself to determine whether the charges were sustained. *Matter of Broome,* 13 A. D. 2d 657 (2nd Dept, 1961, reversed on other grounds 10 N. Y. 2d 942; other citations not applicable). See also *Matter of Gehr* v. *Board of Education,* 304 N. Y. 436 (1952); *Bannon* v. *Bannon,* 270 N. Y. 484, 492-493 (1936).

The cases cited by appellant in support of his argument in this regard, in appellee's view, will be found inapplicable. *Willner, Schware* and *Konigsburg* involved the constitutional sufficiency of proceedings below in which admissions to the Bar had been denied; *Haynes* involved the validity of a conviction upon a confession held to have been not voluntary. Appellee submits that the point raises no substantial federal question.

3. Appellant next questions whether or not the delegation by the Appellate Division to appellee of some of its powers under Sections 90 (2), (6) and (7) of the New York Judiciary Law is unconstitutional (pp. 21-22). Appellant asserts that "to remove an attorney, the appellee would impose a rule that requires an attorney to answer and defend a number of charges, not related to his moral character and fitness to practice, but all bearing upon whether or not he has committed some specific acts of

alleged misconduct." He complains that "he is not even apprised of the fact that the central issue is not 'guilt or innocence' with respect to the specified charges, but his 'fitness to continue' in practice" and that "Consequently, he is afforded no plenary hearing on the issue, and is not confronted by those accusing him of lack of good moral character" (p. 21).

The contention that the Appellate Division has delegated to appellee some of its powers under the cited sections of the Judiciary Law falls of its own weight. The power which the Legislature extended to the Appellate Division to appoint prosecutors and to provide for reimbursement of the costs and disbursements incurred in prosecuting disciplinary proceedings, including the expense of any preliminary investigation, clearly does not constitute a delegation to anyone of any of the Court's authority to deal with or impose discipline, where required, upon any member of the Bar. Appellee's function is merely to conduct a preliminary investigation, prefer charges where warranted and prosecute the same in the courts, subject to all statutory or other regulations or limitations applicable to all litigants. It has and exercises no judicial power. The argument is without merit.

Similarly, appellee imposes no rule. Although stated in the abstract, appellant asserts that he has here been required to answer and defend charges, not related to his moral character and fitness to practice but "bearing upon whether or not he has committed some specific acts of alleged misconduct". His attempted distinction provides deep insight into his character and sense of moral values. To contend that commingling and conversion of clients' funds and the issuance of more than 140 worthless checks, as found by the Appellate Division (pp. 4a-5a), have no

relation to moral character and fitness to practice, is absurd. The argument requires no further consideration.

Appellant's complaints that he was not apprised that his fitness to continue in practice was in issue and was not confronted by those accusing him of lack of good moral character are equally without merit. Virtually fifty years ago, Mr. Justice Cardozo, then speaking for the New York Court of Appeals, wrote:

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional life is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (citing cases). Whenever the condition is broken, the privilege is lost . . ." *Matter of Rouss*, 221 N. Y. 81, 84 (1917).

The Appellate Division has repeatedly held that the purpose of a disciplinary proceeding is not solely discipline or meting out punishment but concern with the fitness of an attorney longer to practice the profession. See *Matter of Ropiecki*, 246 App. Div. 80 (4th Dept., 1935); *Matter of Gould*, 4 A. D. 2d 174 (1st Dept., 1957). Appellant, as an attorney, should have been so aware, if he was not. As for confrontation, appellant's accusers were the facts of his own making. His contention that his constitutional rights were invaded when afforded no plenary hearing on his fitness to continue in practice raises no substantial federal question.

4. In support of his assertion that Rule 12 of the Special Rules Regulating the Conduct of Attorneys of the Appellate Division, First Department, is a statute for all intent and purposes and has the effect of an act of the legislature, appellant cites *Lathrop* v. *Donohue*, 367 U. S. 820 (Wisc. 1961), rehearing denied 368 U. S. 871, wherein this Court

so viewed an order of the Supreme Court of Wisconsin establishing an integrated State Bar and providing for the payment of annual dues (p. 22). The order there involved and Special Rule 12 are readily distinguishable. Special Rule 12 is no more than a direction to the Clerk of the Appellate Division to issue a subpoena in the name of the presiding justice in aid of a preliminary disciplinary investigation upon application of any of the bar associations named or on the part of an attorney under such investigation. It is not mandatory and becomes operative only when invoked by a qualified attorney or bar association. *Lathrop,* therefore, is not authority for the proposition for which cited.

Appellant further asserts that appellee's charter and by-laws are similarly situated. That, of course, is not the fact and *Lathrop* cannot be construed as so holding. Even were Special Rule 12 and appellee's constitution and by-laws statutory in effect, as claimed, the extent to which they entered into the instant proceeding would not, as hereafter shown, provide any basis for appellant's argument that they were unconstitutionally employed.

Appellee is at loss to comprehend the purpose of appellant's citing *Barrows* v. *Johnson,* 346 U. S. 249 and *Lane* v. *Johnson,* 283 N. Y. 244 "as to unfairness and corruption of officers in performance of administrative functions in civil or criminal cases in state court, in violation of the 14th amendment" (p. 22). Not only do these cases not stand for the propositions attributed to them by appellant but there is no occasion for the offensive suggestion that appellant here has been subjected to "unfairness and corruption" on the part of those charged with prosecuting the instant proceeding.

5. Appellant urges that the charge "engaging in the practice of issuing worthless checks" is vague, that the case law in the First Department is such as to preclude any defense thereto and, therefore, that the charge fails to meet the requirements of due process (p. 22).

Actually, appellant was not so charged. The petitions containing bank charges alleged merely the number of checks returned unpaid. Appellant's answers acknowledged that some checks were returned unpaid and alleged mitigating circumstances, including payment and post-dating. The finding of the Appellate Division that appellant engaged in the practice of issuing worthless checks (p. 5a) is a conclusion based on the facts established at the hearings.

Assuming appellant were so charged, however, it is submitted there would be no vagueness present which would invalidate it constitutionally. "Practice" is a common word, in ordinary usage. Section 270 of the New York Penal Law, for example, provides, in part "It shall be unlawful for any natural person to practice or appear as an attorney-at-law . . . or to hold himself out to the public as being entitled to practice law as aforesaid . . . ". Appellant, as a lawyer, if not otherwise, should fully understand the meaning of the word. Although he claims to have received no guidance from the Referee (p. 17), the record reflects the following (Referee's Minutes, p. 1133):

> "MR. JONES: That is specifically what I refer to. What constitutes a practice? What constitutes all of the things that are alleged there? There is no definition and we find no cases on it.
>
> THE COURT: 'Practice' is a word which I imagine you understand. It is a course of conduct, in other

words, in the broad sense, over more than a period of a day, covering some appreciable time.

I would not want to define or limit the period, but that is the connotation it has to me.

If you quarrel with that, I would be glad to hear from you.

MR. JONES: That helps, your Honor".

The primary definition of "practice" ("practise") in Webster's Universal Unabridged Dictionary is:

> "To do or perform frequently, customarily or habitually; to perform by a succession of acts; as to *practise* gaming; to *practise* fraud or deception; to *practise* the virtues of charity or benevolence; to *practise* hypocrisy."

To have issued over a period of time in excess of 140 checks which were returned unpaid either because of insufficient funds or because the accounts were closed (p. 4a) would appear to satisfy the definition fully, just as it eliminates the possibility of mistake or inadvertence. Furthermore, it is not true that there is no defense to a 'bad check' charge. *Matter of Healy,* 11 N. Y. 2d 4 (1st Dept. 1960), merely excluded payment and post-dating as defenses. No other legitimate defense is foreclosed and appellant, in his testimony by affidavit, sworn to November 6, 1963 (p. 15), advanced certain other matters in mitigation, which, obviously, neither the Referee nor the Appellate Division deemed adequate.

It is submitted that this point of appellant is without merit and raises no substantial federal question.

6. Appellant asserts that the "unreasonable search and seizure" issue raised by him is substantial (p. 23). The

main burden of his complaint in this regard appears earlier in his Jurisdictional Statement (pp. 16-17) and is, in substance, that appellee's use of subpoenas, issued pursuant to Special Rule 12, to procure bank records as to his accounts, which appellant claims were his records, without notice to him and opportunity to attack them or otherwise move to protect his interests, constituted an invasion of his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 12, of the Constitution of the State of New York. It is unnecessary here to re-state the other particulars in which he questions appellee's procedures and Special Rule 12 (pp. 16-17).

The subpoenas here involved were issued by the Clerk of the Appellate Division pursuant to Special Rule 12 and were directed to, served upon and complied with by the banks, third parties, not appellant. The records subpoenaed were clearly the banks' property, not appellant's, as claimed. *Matter of Cole et al.; Matter of United States* v. *Franklin National Bank,* 342 F. 2d 5 (2nd Circuit, 1965), Cert. Den. 381 U. S. 950; *Foster* v. *United States,* 265 F. 2d 183 (2nd Circuit, 1959), Cert. Den. 360 U. S. 912; *In re Upham's Income Tax,* 18 F. Supp. 737 (S. D. N. Y., 1937). It is clear, thus, that no unlawful search and seizure were involved. The Appellate Division, Second Department, has held similarly. *Matter of Anonymous, No. 2,* 7 A. D. 2d 735 (1958); *Matter of Anonymous No. 14,* 7 A. D. 2d 735 (1958). Even had the subpoenas been directed to appellant, unlawful search and seizure would not have been involved. *Chait* v. *Bromley,* 129 N. Y. S. 2d 142, modified in part on other grounds 283 App. Div. 698 (1st Dept., 1954), affirmed 306 N. Y. 421; *Weil et al.* v. *New York State Commission to Investigate Harness Racing,* 128

N. Y. S. 2d 874, 880, modified in part on other grounds, 283 App. Div. 808 (2nd Dept., 1954).

Appellant is critical that Special Rule 12 contains no requirement that an original subpoena with an affidavit of service be filed so as to put interested parties on notice of its issuance (p. 17). It may be noted that none of the other statutes cited by appellant relating to subpoenas (pp. 32a-35a) contain such a provision nor is it the rule generally. In any event, appellant clearly had no standing at any time to attack the validity of the subpoenas for that prerogative is reserved to the witness served (Civil Practice Act, Section 411, p. 34a). Accordingly, appellant's objection would appear moot.

It is submitted that appellant's contention that he was a victim of unlawful search and seizure and denial of due process in this regard is without merit and raises no substantial federal question.

7. Appellant asserts that "the appellee advances the theory, and the state courts agreed with appellee, that because the subpoena power was being applied against an attorney, the statutes did not have to be complied with"; also that appellee took the attitude that it was not required to comply with Special Rule 12 (p. 23). Continuing, appellant states that "there has never been any competent proof as to either the issuance or service of the subpoenas, in accordance with the statutes" and attributes to appellee an assertion that "attorneys are not privileged to raise constitutional objections to inquiries into alleged professional misconduct" (p. 24).

Little rejoinder is required. Appellee has advanced no such theory and has made no such assertion. Appellant's characterizations are a distortion of legitimate legal argu-

ments contained in appellee's briefs below. As regards the asserted absence of competent proof as to either issuance or service of the subpoenas involved, appellant omits to advise the Court that at the hearings before the Referee a representative of each bank served appeared as a witness, pursuant to subpoena, produced from the bank's files the subpoena or subpoenas originally served on the bank, proper issuance and service of which are here questioned by appellant, and, except in one instance where waived, was examined in that regard on behalf of appellant. The implication contained in appellant's criticism of the failure of appellee's then counsel, now deceased, to maintain intact "the original subpoenaes, which would have borne the court clerk's signature and seal" (p. 23) is wholly unwarranted. As testified by such counsel, the original subpoenas in every instance bore the Clerk's signature and the seal of the Court (Referee's Minutes, pp. 853-854).

Appellant's argument in this regard as well, in appellee's view, is without substance and raises no substantial federal question.

8. Appellee does not question that this Court has jurisdiction to review the order of the New York Court of Appeals *provided* the appeal is taken in conformity to the Revised Rules of this Court and *provided* the appeal raises substantial federal questions and *provided* the judgment does not rest on an adequate non-federal basis. Appellee submits that none of these conditions has here been met.

9. Appellant aserts that "What the appellee has argued and been upheld in thus far, is that its authority to keep surveillance over attorneys is unchallengeable, and that its decisions and those of the appellate division with respect to disciplining attorneys are not subject to review, except with approval of either the appellee or the appellate divi-

sion" (p. 25). The statement is unwarranted, untrue and, in appellee's view, contemptuous of the Appellate Division and *a fortiori* the Court of Appeals. Appellant has the same right of appeal as any other litigant. In pursuing that right, however, he is not entitled to exemption from the constitutional and statutory jurisdictional limitations which govern the appellate courts. Nor does the application of such jurisdictional limitations to his case constitute discrimination against him as an attorney or otherwise. Appellee submits that the appeal herein is not well founded jurisdictionally in that there is not here in fact drawn in question the validity of the state statutes asserted by appellant to be unconstitutional for the reasons assigned and that no substantial federal question is raised by this appeal.

III.

The judgment below, as to which the New York Court of Appeals entered its order of dismissal which is here on appeal, rests on an adequate non-federal basis.

As stated initially (*supra*, p. 3), the petitions herein contain twelve charges of professional misconduct on appellant's part. Of these, but six relate to the issuance of checks which were returned unpaid, which the Appellate Division found to constitute engaging in the practice of issuing worthless checks and to which appellant principally objects upon the constitutional grounds urged. As to the remaining six charges, appellant raises no question on the merits and no constitutional point, other than that raised in Question II A, which is directed to an asserted delegation by the Appellate Division to appellee of some of its disciplinary powers and questions whether an asserted failure by the Court or appellee to promulgate procedural regulations

in disciplinary proceedings constitutes a deprivation of property without due process of law (p. 9; see also p. 21). The procedures followed in preliminary investigations by appellee's Committee on Grievances are, of course, those common to every judicial or quasi-judicial proceeding and are similar to those followed herein at the hearings before the Referee. Appellant's point would appear to be immaterial, however, for subdivision 6 of Section 90 of the Judiciary Law provides that before an attorney is suspended or removed he must be served with charges and must be allowed an opportunity of being heard in his defense (pp. 28a-29a). That requirement was fully complied with here.

The charges and findings of the Referee and Appellate Division thereon, as previously stated (see pp. 8-9, *supra*), are set forth in counsel's affidavit, sworn to May 25, 1965 (pp. 3-6), which has been designated to be certified as part of the record herein. It is submitted that the charges as to the *Cheeseboro, White-Delaware County, Newsome* and *Carry-On-Club* cases alone, which have been found sustained virtually in their entirety, would suffice to support the order of disbarment entered herein. Where the Appellate Division has found an attorney guilty of gross unprofessional conduct and has decreed his disbarment, the power of review in the Court of Appeals is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. *Matter of Flannery,* 212 N. Y. 610 (1914); *Matter of Robinson,* 209 N. Y. 354 (1913); *Matter of Goodman,* 199 N. Y. 143 (1910). Appellant has not raised any issue as to his substantive guilt of these charges but has limited his appeal to procedural matters.

CONCLUSION

Appellee respectfully submits that the appeal should be dismissed because not taken in conformity to the Revised Rules of this Court, because the appeal presents no substantial federal questions and because the judgment rests on an adequate non-federal basis.

Respectfully submitted,

JOHN G. BONOMI
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The Association of the Bar
of the City of New York

RAYMOND P. WHEARTY
Of Counsel

May 11, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1223~~ 102

In the Matter of

RICHARD HOWARD JONES, *An Attorney,*

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPELLANT'S JURISDICTIONAL STATEMENT

The Appellee has moved, pursuant to Rule 16, Subdivision 1, of the Revised Rules of the Supreme Court of the United States to dismiss Appellant's appeal from the Court of Appeals of the State of New York's order dismissing appellant's appeal to the said Court of Appeals on the ground that the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department appealed from did not present any "substan-

tial constitutional questions". The Appellee moves on three grounds, to wit: (1) that the appeal is not within the jurisdiction of this Court, because not taken in conformity to Revised Rule 13, subdivision 1; (2) the appeal presents no substantial federal questions, and (3) the judgment rests on an adequate non-federal basis.

Preliminary Statement

Appellant has briefed the question of whether or not the appeal presents any substantial Constitutional questions, in his jurisdictional statement, filed in this Court on April 15, 1966, at pages 20-25, thereof. To repeat it here would be redundant. Therefore, as to that issue, appellant will rely upon the points and cases presented on the pages of the jurisdictional statement, above referred to.

The appellee has not properly stated the facts involved in the proceedings. There were six (6) charges or complaints made to the appellee about the appellant. In the instance of each complaint made, appellant, upon receipt of letters of charges from the appellee, answered the letters, and in the instances involving checks returned unpaid, alleged the return of such checks. Notwithstanding the admission of the return of the checks, the appellee proceeded to subpoena appellant's bank records, not to determine whether or not the check had been returned, but to determine how many others were returned on that particular account. For that purpose, appellee subpoenaed the appellant's accounts, in each instance, from the date the account was opened, to the date it was closed, or if still in operation, up to the date the subpoena was returnable. While the Rules of the Appellate Division, First Department pre-

scribe the method of issuing such subpoenaes, there is nothing in the record to show that the rule was complied with. While the banks responded to the subpoenaes as served upon them, and produced the copy served upon them at the hearings, that is no proof that the subpoenaes were either issued or served in accordance with the statutes. The best evidence of such service would have been the original subpoenaes which would have borne not only the signature and stamp of the said Appellate Division, but the affidavit of service made by the process server who served the subpoenaes. However, the only testimony that was forthcoming from Appellee's office with respect to the whereabouts of the original subpoenaes was given by Louis B. Reynolds, Esquire, one of appellee's staff attorneys, to the effect that in ridding the file of excess papers, he tore up the originals of the subpoenaes, because he didn't think they would be needed (see, Jurisdictional Statement, p. 23). None of the bank witnesses could testify as to how the subpoenaes were served, since none of them actually received the subpoena when it was served.

In addition, the bank charges, in so far as they related to the six (6) specific complaints of misconduct—two of which were dismissed, i.e. found not sustained, by the referee, and the other four of which were found not sustained in so far as any misconduct was concerned, by the referee—were included in the specific charges of misconduct; therefore, there was no need for the bank charges, unless the appellee was on a fishing expedition, looking for additional charges to make against the appellant.

Appellant wishes to add that the Referee who heard the charges was the Hon. John A. Mullen, who, at the outset, was acting as an Official Referee, he having retired from

the bench after a long and distinguished record of service. However, during the hearings, due to Court reorganization, he was reinstated as a Supreme Court Justice, during the proceedings against appellant. Mr. Justice Mullen has heard many disciplinary proceedings, and has a reputation for fair play and integrity in these proceedings. Yet, the Appellate Division found it necessary to overrule him, and find as it did, without stating any basis therefor.

ARGUMENT

I.

All of the orders enlarging appellant's time to docket his appeal and file his jurisdictional statement were timely served and filed with the Clerk of the Appellate Division, First Department.

The appellee's contention that the Appellate Division, First Department had no jurisdiction to make the enlargement orders it entered dated February 21, 1966, and March 31, 1966, and that this Court is, therefore, without jurisdiction to entertain this appeal is without merit. Rule 13, subdivision 1, of the Revised Rules of the Supreme Court of the United States requires the first application for an enlargement of time to be presented to the Clerk of the Court in which the application is made, within the original sixty (60) day period. The application for the order was timely filed, on February 14, 1966; however, since appellant had to give appellee notice of the time and place it would be presented for signature, the notice recited that order would be presented for signature on February 16, 1966, when it was so presented and signed.

Appellant respectfully submits that Section 13, subdivision 1, does not state that the Court possessed of the record cannot make an extension of time, other than an enlargement of the original sixty day period, nor does it say that the court possessed of the record is without discretion to grant an enlargement of time after the expiration of the period sought to be enlarged. Those restrictions are placed only upon the Justices of the Supreme Court, by Section 34, subsection 2, of the said Revised Rules of the Supreme Court of the United States.

Appellee's contention that the order of enlargement dated March 31, 1966 was improperly granted is based upon its contention that the order of February 21, 1966 was invalid, since there is no question as to the timeliness of the submission of that order for signature.

Similarly, appellant is hard put to understand how the envelope in which appellee received the notice of presentation of the order of enlargement dated February 21, 1966, came to be dated "FE 16 AM, 1966". The letter was placed in a mailbox in front of General Postoffice, in New York City, just about midnight, Monday, February 14, 1966; therefore, it was mailed on the night of the 14th of February and running into the morning of February 15, 1966. It should, under no circumstances, have been postmarked for February 16, 1966.

Appellant respectfully submits that the order signed by the Appellate Division, First Department, dated February 21, 1966, enlarging appellant's time to docket his case to March 31, 1966, was timely submitted, and properly signed by the said Appellate Division, and that the order signed by the said Appellate Division on March 31, 1966, the last day of the enlarged period, was timely made and filed, and

that this Court, therefore, has jurisdiction to entertain the appellant's appeal.

II.

The judgment below, as to which the New York Court of Appeals entered its order of dismissal which is here on appeal, does not rest on any adequate non-federal basis.

Appellee's contention that appellant has raised no question on the merits of the charges other than the check charges and no constitutional questions with respect to the charges is totally untrue. Appellant's entire brief on the motion and cross-motion to confirm and disaffirm the Referee's Reports was dedicated to an attack upon the evidence, the sufficiency of the evidence, the competency of witness, and the like. Similarly, in appellant's affidavits in opposition to appellee's motion to dismiss appellant's appeal to the Court of Appeals, appellant raised issues as to the sufficiency of the evidence, the competency of witness, and the like, all directed towards getting a determination as to whether or not the decision rested upon solid non-federal grounds. In refusing to hear the appeal, the Court of Appeals deprived appellant of a determination on those questions, as well as upon the constitutional questions presented. There were alleged complainants, as in the Delaware County charge, with whom appellant was never confronted. Conflicts in testimony, and admissions of incompetent testimony and exhibits pervade the record. It is therefore a misrepresentation of the facts, when appellee states that appellant has not raised any issue as to substantive guilt of the charges. The entire hearing was

based upon whether or not appellant was guilty of the substantive charges. Therefore, appellant could not raise an appeal, without attacking the substantive aspects of the proceeding.

It so happens that the appellant placed emphasis upon procedural matters in so far as the check charges are concerned, because this is the area in which appellee feels that appellant completely overstepped the bounds of propriety. It completely disregarded appellant's rights, and commenced a witch hunt for additional evidence to bring additional charges against the appellant.

Appellee has cited *Matter of Flannery,* 212 N. Y. 610 (1914), and *Matter of Goodman,* 199 N. Y. 143 (1910), as authority for the proposition that review in the Court of Appeals, in disciplinary proceedings, is limited to the consideration of the single question of whether the finding of guilt has any evidence to sustain it. Appellant respectfully submits that in his jurisdictional statement, appellant attacked this very theory, and in so doing stated that it denied attorneys, as a class, the equal protection of the laws. Appellant further submits that it is precisely for the purpose of getting the Court of Appeals to review the entire proceeding before the Appellate Division that appellant has prosecuted this appeal before this Court.

It is no secret within the City, and indeed, appellant believes, within the State of New York, that the appellee rides rough-shod over attorneys under its jurisdiction; so much so, that when an attorney receives any kind of communication from appellee, he panics immediately. He is aware that appellee is not out to help him adjust his differences with those who complain against him. He also knows

that, except in rare cases, he has no recourse against the actions of the appellee, since the appellee is not at all loath to tell you that the Appellate Division will go along with whatever appellee suggests, in so far as disciplining an attorney is concerned. This in itself makes a mockery out of the proceedings conducted prior to meting out discipline to an attorney.

Further, the appellee prides itself in exclaiming that the Appellate Division, First Department has never reinstated an attorney it has disbarred. All of the other Appellate Divisions are more tolerant in their attitudes towards reinstatements, and are much more meticulous in the rules they have promulgated to govern disciplinary proceedings. All of this shows that other Appellate Divisions have given some thought to the rights of attorneys, and to the consequences of such a harsh punishment as disbarment, and have taken precautions to see that the attorney gets every protection and every possible consideration, even before the proceeding is instituted, and certainly during the proceeding.

A typical illustration of the attitude appellee has with respect to attorneys in disciplinary proceedings occurred at the hearings in the proceedings before the Referee on the check charges herein. When it was not establishd to appellee's attorney's satisfaction that a certain subpoena had been served upon a bank, the attorney volunteered the statement that he remembered having served the subpoena himself, along with another subpoena in another matter. He was required to take an oath as a witness as a prerequisite to taking his testimony; however, upon being cross-examined it developed that he was not telling the truth, and he asked for permission to retract his statements.

At the suggestion of the referee, Appellee consented to have the testimony expunged from the record.

The appellant is confident that the record below would not be sustained on an appeal prosecuted either in the Court of Appeals of the United States, or the United States Supreme Court. The errors in the record are glaring. The irregularity of the proceeding, plus the long delay in prosecuting the proceeding, which caused it to drag on for four years before it came to a conclusion, all are in violation of appellant's constitutional rights. And, above all, the evidence adduced at the hearings was insufficient to sustain the decision appealed from.

III.

Appellant incorporates into and makes his jurisdictional statement a part of this brief for purposes of this motion.

Appellant incorporates into, and makes his jurisdictional statement, filed April 15, 1966, a part of this brief in opposition to appellee's motion to dismiss appellant's appeal to this Court from the Order of the Court of Appeals of the State of New York.

Appellant submits that there is no merit to appellee's claim that the judgment below is based upon adequate non-federal grounds to support the court's decision, and the refusal of the Court of Appeals to hear the appeal.

CONCLUSION

Appellant respectfully submits that the appellee's motion to dismiss Appellant's appeal to this Court from the Order of the Court of Appeals of the State of New York dismissing appellant's appeal to that court for the reason that no substantial constitutional questions were presented, should be in all respects denied for the reasons that (1) the appeal was timely taken, (2) the enlargements were properly granted, (3) the federal questions raised on the appeal are substantial, and (4) the judgment below does not rest upon an adequate non-federal basis.

Respectfully submitted,

RALPH B. RAUKX
Attorney for Appellant
Richard Howard Jones

Dated: New York, New York
June 9, 1966.

END